Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,

Petitioners,

-and-

CECIL PARKER, *et al.*,

Petitioners,

v.

G. M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a district court's role in overseeing a remedial consent decree over which it has jurisdiction is limited to instituting contempt proceedings for violation of particular provisions of the consent decree, or whether the court may exercise its equitable powers to advise against or prohibit practices which undermine the purpose of the decree?

Whether an appellate court, without request of any party and without providing counsel with notice and an opportunity to be heard, may find that counsel's conduct before the district court below constituted abuse of judicial process warranting possible imposition of sanctions under 28 U.S.C. § 1927.

Whether an appellate court departs from the accepted course of judicial process by making findings of fact based on its own erroneous construction of evidence in the record.

Whether an appellate court has authority to vacate district court orders that are not before the appellate court.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties in the court below:

Plaintiff-Appellee Class Representatives and Plaintiff Class Members, now Petitioners:

Johnny Reynolds, individually on behalf of himself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated, Plaintiffs-Appellees-Petitioners;

Ouida Maxwell, individually on behalf of herself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated, Plaintiffs-Appellees-Petitioners;

Martha Ann Boleware, individually on behalf of herself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated, Plaintiffs-Appellees-Petitioners;

Peggy Vonsherie Allen, individually on behalf of herself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated, Plaintiffs-Appellees-Petitioners;

Jeffery W. Brown, individually on behalf of himself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated, Plaintiffs-Appellees-Petitioners;

Cecil Parker, Intervenor-Plaintiff-Appellee – member of the Plaintiff class;

Robert Johnson, Intervenor-Plaintiff-Appellee – member of the Plaintiff class;

Frank Reed, Intervenor-Plaintiff-Appellee – member of the Plaintiff class;

Florence Belser, Intervenor-Plaintiff-Appellee – member of the Plaintiff class;

C. Campbell Wilson, Intervenor –Plaintiff-Appellee – member of the Plaintiff class;

Adams Intervenor-Appellant Class Representatives and Adams Class members of non-black employee class, now Respondents:

William Adams, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Cheryl Caine, on behalf of herself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Tom Colquitt, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

William Flowers, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Wilson Folmar, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

George Kyser, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Becky Pollard, on behalf of herself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Ronnie Pouncey, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Terry Robinson, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Tim Williams, on behalf of himself and all similarly situated persons (non-black employees), Adams Intervenor-Appellant;

Michael Grant, member of Adams class of non-black employees;

John D'Arville, member of Adams class of non-black employees;

Andrew McCullough, member of Adams class of non-black employees;

Defendant-Appellees, now Respondents:

G.M. Roberts, in his official capacity as Director of the Alabama Department of Transportation, Defendant-Appellee;

Department of Transportation, State of Alabama, Defendant-Appellee;

Department of Personnel, State of Alabama, Defendant-Appellee;

State of Alabama, Defendant-Appellee;

Donald Siegelman, in his official capacity as Governor or the State of Alabama, Defendant-Appellee;

Ray Bass, Defendant-Appellee;

Marvin Wagonner, Defendant-Appellee;

Thomas G. Flowers, Director of the State Personnel Department, Defendant-Appellee.

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals issued on March 29, 2000, vacating and remanding the District Court's preliminary injunction and declaratory judgment is reported at 207 F.3d 1288, and attached at Appendix A, *infra*, pp. 1a-30a. The decision of the District Court for the Middle District of Alabama is reported at 996 F. Supp. 1130, and attached at Appendix B, *infra*, pp. 31a-98a.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals denying Petitioners' Petitions for Rehearing En Banc and for Rehearing is unreported and was entered on December 14, 2000. (Appendix, *infra*, pp. 99a-101a). This Petition for Writ of Certiorari is timely filed within the ninety days provided by Supreme Court Rule 13.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The All Writs Act, 28 U.S.C. § 1651:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 1927:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 2106:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The Declaratory Judgment Act, 28 U.S.C. § 2201(a):

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined

> in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

I. Proceedings in the District Court

The District Court's opinion provides a detailed factual history of this long-standing lawsuit, which can only briefly be summarized herein. *See Reynolds v. ALDOT*, 996 F. Supp. 1130, 1132-1151 (M.D. Ala. 1998).

A. *The Reynolds/Frazer Litigation*

The *Reynolds* Plaintiffs, a class of black employees of the Alabama Department of Transportation ("ALDOT"), filed suit under Title VII in May of 1985, seeking relief from discriminatory employment practices. Plaintiffs alleged, and the District Court ultimately found, that ALDOT had manipulated and circumvented employment procedures so as to avoid hiring or promoting black employees. ALDOT was systematically excluding qualified black employees from higher positions such as Graduate Civil Engineer, by imposing arbitrary and inconsistent requirements on black applicants and delaying the processing of applications filed by black employees such that black employees were not on the job register from which vacancies were filled. When black employees finally had made their way onto the job register, ALDOT bypassed the register and began to follow instead a closed and noncompetitive system of hiring and promotion, under which positions were awarded among employees without ever being opened to black applicants. *Reynolds*, 996 F. Supp. at 1134-36. Evidence was presented that ALDOT had neither posted job announcements

nor received applications in certain job categories for as long as seven years. *Id.* at 1136.

On July 31, 1992, *Reynolds* was consolidated with on-going proceedings against racial discrimination in employment opportunities at various Alabama state agencies, including ALDOT, in *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970), *aff'd*, sub nom. *NAACP v. Allen*, 493 F.2d 614 (CA5 1974), *further relief*, No. 2709-N, 1976 WL 729 (M.D. Ala. Aug. 20, 1976) ("*Frazer*").[1] The *Frazer* court already had repeatedly enjoined ALDOT's discriminatory employment practices, *see* 317 F. Supp. at 1090-91, 1976 WL 729 at *6-*8, and specifically found that ALDOT had, for over six years, "generally avoided compliance with the decrees in this case" by various manipulations of state employment procedures. *Id.* at *4.

Although the *Reynolds* Plaintiffs were third party beneficiaries of the injunctive relief earlier entered in *Frazer*, they continued to suffer the very same unlawful discriminatory practices. Over the twenty years following the *Frazer* injunctions, ALDOT continued to "preclude black applicants from applying for the historically white job classifications for prolonged periods," by refusing "to permit applications for years at a time while the existing register used to fill vacancies was either all-white or predominantly white," and by instituting "a battery of new screening criteria and examinations" when the "predominantly white" register had been exhausted. *Reynolds*, 996 F. Supp. at 1134-35.

During the course of the *Reynolds* litigation, Plaintiffs and ALDOT reached a partial settlement of the employment discrimination claims. *Id.* at 1136. This settlement agreement was presented to the District Court for approval. *Id.* A group of

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1. The United States instituted the *Frazer* litigation in 1968 against the State Personnel Department and six other State agencies. In 1973, the United States added ALDOT (known then as the Highway Department) and all remaining State agencies, except for the Department of Public Safety, as defendants to the *Frazer* litigation.

non-black employees (referred to as the Adams intervenors; "Intervenors" herein) were allowed to intervene for the limited purpose of challenging any race-conscious provisions of the settlement.[2] *Reynolds v. Roberts*, 846 F. Supp. 948, 954 n.8 (M.D. Ala. 1994). After a fairness hearing, the settlement agreement was divided into three parts. R6-513; R6-514; R6-552. On March 16, 1994, the District Court approved Consent Decree I (the "Consent Decree"),[3] which consisted of several articles detailing class wide, race-neutral declaratory and injunctive relief. Pet. App. D, pp. 102a-164a. The parties expressly agreed that it was their "intent and purpose . . . to undo the effects of the past practices which have been the subject of this case and Decree and to prevent further practices which may . . . otherwise discriminate against the plaintiffs and the class they represent." Pet. App. D, p. 158a. ALDOT was required to establish, "in a timely manner, new, non-discriminatory personnel procedures that would allow African-Americans and all other employees to compete for positions, openly and fairly, without regard to race." *Reynolds*, 996 F. Supp. at 1136-37. The Consent Decree further set out specific requirements for hiring and promotion that were intended to "significantly restrict any opportunity for the Transportation Department to manipulate and circumvent personnel procedures in the future so as to avoid the hiring and promotion of African-Americans." *Id.* at 1137.

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2. The Adams intervenors did not object to or appeal the limited scope of intervention. In 1998, the Court granted class certification to the Adams intervenors "limited to the purpose of their intervention – to challenge the race-conscious provisions of the proposed consent decree." R21-2612.

3. The Adams Intervenors are neither signatories nor parties to Consent Decree; however, they agreed with the District Court that Consent Decree contained only race-neutral relief. R6-552. The other two parts of the settlement remain pending before the District Court with the exception of one provision approved by the District Court on January 23, 1998, which presently is on appeal before the Eleventh Circuit.

Article XIX, ¶ 7 of the Consent Decree required that ALDOT establish an "enhanced complaint procedure," subject to review by Plaintiffs' counsel. Pet. App. D, p. 159a. The procedure first instituted under this Article required that grievances be submitted to the District Court if attempts to resolve the problem by the employee and her supervisor, and by the employee and ALDOT's EO monitor, had failed. Pet. App. N, pp. 259a-262a. After a number of grievances had been submitted to the District Court for resolution, the court ordered Plaintiffs and ALDOT to revise the procedure, which although required under the Consent Decree had not actually been incorporated into the Consent Decree, and thereby remove the court from the grievance process. Pet. App. M. The revised grievance procedure (the "grievance procedure") again required that the employee and supervisor, and then the employee and EEO monitor, attempt to resolve the grievance. Pet. App. L, pp. 244a-248a. If those attempts were not successful, the grievance was to be submitted to a hearing officer, and then, if necessary, to binding arbitration. Pet. App. L, pp. 248a-250a. This revised grievance procedure was approved on August 9, 1995. Pet. App. O.

B. *Proceedings Concerning Unforeseen Abuses of the Grievance Process*

Unanticipated abuses of the grievance process through private, "friendly" settlements between employees and supervisors outside the "open and fair" competitive hiring and promotion procedures required under the Consent Decree, first were brought to the District Court's attention by ALDOT in a January 14, 1997, motion to dismiss the grievances of three white employees (McCullough, D'Arville, and Grant), who had complained that they were working "out of classification" in violation of the Consent Decree. ALDOT was concerned that these employees were about to receive provisional appointments to positions that had not been opened to competition and that such appointments, if they occurred, would violate the Consent Decree. *Reynolds*, 996 F. Supp. at 1137; *see also* Pet. App. K.

The District Court denied ALDOT's motion on the ground that the court had no role at that stage of the grievance procedure, and denied ALDOT's concurrent motion for protective order against being penalized for violation of the Consent Decree as premature. *Id.*

Use of "out of classification" grievances to award similar "friendly" noncompetitive appointments grew rapidly. By February 1997, it had been nearly three years since ALDOT made *any* competitive appointments. *Reynolds v. ALDOT*, 972 F. Supp. 566, 569-70 (M.D. Ala. 1997). Accordingly, on February 13, 1997, Plaintiffs filed a motion for contempt, challenging the "out of classification" assignments at the root of the noncompetitive appointments awarded under the grievance procedure. R16-1542. On February 18, 1997, the District Court ordered ALDOT to show cause why it should not be held in contempt. R16-1552. While the contempt motion was pending, Plaintiffs filed a motion for a temporary restraining order, requesting that the court prevent implementation of the noncompetitive appointments offered to McCullough, D'Arville, and Grant on the ground that those grievance awards would violate the Consent Decree. *Reynolds*, 996 F. Supp. at 1137. The court granted the motion, so as to preserve the *status quo* and prevent irreparable harm until it could decide the larger issue of whether grievances seeking noncompetitive appointments based on out-of-classification assignments violated the Consent Decree. *Id.* That Order subsequently was extended by a preliminary injunction entered April 9, 1997, noting that "the defendants join the plaintiffs in contending that Grant, D'Arville, and McCullough are misusing the grievance process, and thus the defendants agree, in words of defense counsel, that the Court should 'stop the grievance procedure for everyone right here, both black and white.' " Pet. App. G, p. 207a.

On March 20, 1997, ALDOT filed a pleading disclosing that thirty four additional grievances similar to the "out of classification" grievances previously filed by McCullough,

D'Arville, and Grant had been filed, and that at least two of those grievances were filed by black employees. Pet. App. J, pp. 226a, 229a n.2. Based on this disclosure, Plaintiffs filed a motion for temporary restraining order and preliminary injunction seeking to enjoin all sixteen of the grievances, including those filed by black employees. Pet. App. I, pp. 217a. Because an agreement was entered between Plaintiffs, the Adams Intervenors, and ALDOT which stayed processing of *all* "out of classification" grievances – whether filed by black or white employees – if they sought appointment or reclassification to positions that had not been opened to competition, the court did not enter a temporary restraining order, but instead scheduled the motions for hearing. Pet. App. H.

After seven days of hearings, on March 3, 1998, the District Court granted declaratory relief, finding that use of the grievance procedure to award "friendly," noncompetitive appointments perpetuated practices forbidden by the Consent Decree and condemned by *Frazer*. *See Reynolds*, 996 F. Supp. at 1151-52. Although neither ALDOT nor the Adams Intervenors had raised the issue of whether Plaintiffs' motions should have been framed in terms of contempt, the District Court, out of an abundance of caution, gave ALDOT fourteen days to "note an objection" and request that "these proceedings be recast as civil contempt proceedings."[4] *Id.* at 1155-56. Neither ALDOT nor the Intervenors noted any objection.[5]

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4. The District Court also stated that entering only declaratory relief at this time would serve as a valuable tool for focusing the issues if the proceedings were eventually recast as contempt. *Reynolds*, 996 F. Supp. at 1155.

5. On January 31, 2000, the District Court ruled on Plaintiffs' 1997 motion for contempt and held, pursuant to ALDOT's express stipulation, that ALDOT had violated the Consent Decree. *Reynolds v. ALDOT*, 84 F. Supp. 2d 1339, 1351 (M.D. Ala. 2000).

II. Proceedings in the Court of Appeals

This case came before the Eleventh Circuit on appeal of the District Court's preliminary injunction of April 9, 1997, and declaratory judgment entered on March 3, 1998. ALDOT subsequently dismissed its appeals, and the Intervenors' appeals were consolidated, for the purposes of briefing, with yet another appeal filed by ALDOT and the Intervenors, as well as the cross-appeal by Plaintiffs. Due to the court's page number limitations, Plaintiffs were able to address issues raised by the injunction and declaratory judgment concerning unforeseen and improper uses of the grievance procedure in only six of eighty pages. No party briefed or argued the issue of whether Plaintiffs were limited procedurally to a motion for order to show cause why ALDOT should not be held in contempt, and no party challenged the District Court's authority to issue a declaratory judgment. Likewise, whether Plaintiffs' counsel had conducted himself improperly under 28 U.S.C. § 1927 in the court below was not briefed or raised at oral argument.[6]

Nonetheless, the Eleventh Circuit vacated the District Court's preliminary injunction and declaratory judgment on the ground that the District Court properly could have proceeded only by holding a "show cause" hearing and finding ALDOT in contempt. *Reynolds*, 207 F.3d at 1298-99. The Eleventh Circuit further indicated, in direct opposition to the District Court's findings of fact, that Plaintiffs were not injured by uses of the grievance procedure to award noncompetitive appointments, and that both the District Court and Plaintiffs' counsel sought to preclude only grievance awards to non-black employees.

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6. There was a single question at oral argument concerning the procedural propriety of Plaintiffs' motions for injunctive relief, rather than a motion for order to show cause why ALDOT should not be held in contempt. Upon instruction from the Eleventh Circuit panel, Plaintiffs' counsel submitted in letter form substantial authority for the proposition that a court may implement the purpose of a consent decree through means other than contempt.

Id. at 1299-1300.[7] Because, in the Eleventh Circuit's view, Plaintiffs' counsel sought to preclude only non-black grievances in the absence of injury to the Plaintiff class, the Eleventh Circuit held that counsel's conduct in the District Court amounted to a sanctionable abuse of judicial process. *Id.* Finally, the Eleventh Circuit instructed the District Court to "restore the case to the status quo ante, which means nothing has happened in this case since August 9, 1995, when the district court entered its Order and Injunction, amending Consent Decree I to incorporate the Revised [Grievance] Procedure."[8] *Id.* at 1302. On March 29, 2000, when the Eleventh Circuit issued this Order, returning the case to the status quo ante meant obliterating over 3500 docket entries and nullifying scores of District Court orders which had not been the subject of any appeal.

The present Petition for Writ of Certiorari is directed toward the Eleventh Circuit's holding that contempt proceedings are the only means by which a district court may address problems that arise in continuing implementation of consent decrees meant to address long-standing patterns and practices of racial discrimination; the Eleventh Circuit's unwarranted and unsupported finding, in the complete absence of due process, that Plaintiffs' counsel engaged in sanctionable conduct by attempting to stop discriminatory employment practices in his representation of the *Reynolds* class; and the Eleventh Circuit's intemperate disregard of the District Court's findings of fact, in going so far as to make its own factual determinations and purporting to nullify almost five years of District Court proceedings.

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7. *But See Reynolds*, 996 F. Supp. at 1152; Pet. App. I (Plaintiffs seeking to enjoin grievances brought by both black and white employees that would result in an abuse of the grievance procedure).

8. The District Court's August 9, 1995 Order merely approved the revised grievance procedure. It did not purport to amend the Consent Decree. Pet. App. O.

REASONS FOR GRANTING THE WRIT

Compelling reasons for granting this petition for certiorari include the need to resolve a conflict among the circuits regarding the means by which a court may ensure that a consent decree achieves its intended remedial purpose, and the scope of due process rights in connection with imposition of sanctions pursuant to 28 U.S.C. § 1927. This Court's review further is warranted because the Eleventh Circuit panel departed from the accepted course of judicial process, making its own factual determinations grounded in its own construction of record evidence and purporting to nullify district court judgments that were not before it.

This case presents important questions concerning: (1) the conflict between the Circuit Courts of Appeals regarding a district court's authority to invoke its equitable powers in effectuating the purpose of a remedial consent decree over which it has jurisdiction; (2) constitutional limits on the scope of an appellate court's authority to impose sanctions pursuant to 28 U.S.C. § 1927 for conduct in the district court below; and (3) the limits of appellate jurisdiction with respect to district court orders which have not been appealed.

I. The Eleventh Circuit's Holding That the Authority of the District Court To Oversee the Consent Decree Is Limited to Its Contempt Power Conflicts with Federal Law.

A writ of certiorari should be granted so that this Court can reconcile the conflict between the Eleventh Circuit's holding and that of other Courts of Appeals regarding the methods by which district courts may resolve controversies concerning remedial consent decrees. The Eleventh Circuit, relying on its earlier precedent, *Newman v. Alabama*, 683 F.2d 1312 (CA11 1982), and in direct conflict with other decisions of the federal Courts of Appeal and statutory law, held that district courts could address problems arising in implementation of consent decrees only through contempt proceedings and,

accordingly, that the District Court below did not have the power to enter its preliminary injunction and declaratory judgment.

A. *The District Court Did Not Abuse Its Discretion in Granting Both the Preliminary Injunction and the Declaratory Judgment.*

Contrary to the Eleventh Circuit's holding, *Reynolds*, 207 F.3d at 1298-99, the District Court was not constrained to defer determination of the issues raised by the parties about the unforeseen uses of the grievance procedure until Plaintiffs filed a motion for order to show cause why ALDOT should not be held in contempt. It is well-settled that a district court has inherent power to issue a declaratory judgment or other remedy specially tailored to the facts and circumstances before the court. *See, e.g., Berger v. Heckler*, 771 F.2d 1556, 1568-69 (CA2 1985) (federal court's interest in orderly and expeditious enforcement of its decree "justifie[d] any reasonable action taken by the court to secure compliance with its orders"); *Gates v. Collier*, 616 F.2d 1268, 1271 (CA5 1980) ("the court may use any of the weapons generally at its disposal to ensure compliance" with a consent decree). The All Writs Act, 28 U.S.C. § 1651(a), provides that a federal court may "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Declaratory Judgment Act, 28 U.S.C. § 2201(a), further provides that a district court's declaration of "the rights of a interested party" is appropriate even where other avenues of relief may be available. *See also Powell v. McCormack*, 395 U.S. 486, 499 (1969) (court may grant declaratory relief even though other forms of relief also may be appropriate).

As this Court and the First, Second, Third, Fourth, and Fifth Circuit Courts of Appeals have held, the fact that a district court has not made a finding of contempt does not preclude the court's exercise of equitable powers in furthering the remedial purpose of a consent decree, especially where, as here, the consent decree itself provides that the district court "retains jurisdiction to decide any and all questions which arise under this Decree . . ."

Consent Decree, Article 19, ¶ 10; Pet. App. D, p. 160a. *See also In re Pearson*, 990 F.2d 653, 658 (CA1 1993) (court's "ongoing supervisory responsibility" with regard to consent decrees "carries with it a certain correlative discretion") (citing *System Fed'n No. 91 v. Wright*, 364 U.S. 642, 648 (1961)). In rejecting the contention that a district court lacks authority to impose remedies "absent a finding of contempt," the Fourth Circuit aptly has stated that "words are possessed of no magical properties, incantations should not decide cases, and the lack of a finding of contempt or of bad faith should not preclude exercise of inherent equitable powers to achieve fair remedial results." *Alexander v. Hill*, 707 F.2d 780, 783 (CA4 1983). *See also Berger*, 771 F.2d at 1569 ("Ensuring compliance with a prior order is an equitable goal which a court is empowered to pursue even absent a finding of contempt."); *Brewster v. Dukakis*, 675 F.2d 1, 3-4 (CA1 1982) (court's power to interpret a consent decree, where "clarity of obligation necessary for enforcement through contempt has not yet been established," includes a "limited injunctive power . . . when . . . unforeseen circumstances have required interpretation of the decree").

Likewise, the propriety of declaratory relief does not depend upon whether contempt has been sought or is available, but rather "depends on whether there is a live dispute between the parties." *Powell*, 395 U.S. at 518 (citing *Golden v. Zwickler*, 394 U.S. 103 (1969)). Settlement of controversies, such as that over unforeseen applications of the grievance procedure here at issue, "before they ripen into violations of law or some breach of contractual duty is a fundamental purpose of the Declaratory Judgment Act." *Scott-Burr Stores Corp. v. Wilcox*, 194 F.2d 989, 990 (CA5 1952) (citation and punctuation omitted). *See also Aluminum Co. of America v. Beazer East, Inc.*, 124 F.3d 551, 560 (CA3 1997) ("parties have the prerogative to seek only a declaratory judgment even though the party . . . could have . . . asked for coercive relief.").

A district court has great latitude to choose remedies appropriate to the particular circumstances of a Title VII

employment discrimination case. It is well-settled that district courts are vested with broad and flexible equitable powers in effectuating remedial consent decrees intended to address statutory and constitutional violations of individual rights by public institutions such as prisons, schools, and other state employers. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378-83 (1992). *See also Teamsters v. United States*, 431 U.S. 324, 364-65 (1977) (federal courts have broad equitable powers in Title VII cases "to make possible the fashioning of the most complete relief possible") (citation and punctuation omitted); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777-78 (1976) (Title VII injunctive relief "must not be confined within narrow canons for equitable relief deemed suitable . . . in ordinary private controversies" and holding that the federal courts have "broad equitable discretion" in such cases) (citation and punctuation omitted).

The District Court appropriately exercised its broad equitable discretion in responding to the parties' concerns about unforeseen uses of the grievance procedure by issuing a preliminary injunction barring implementation of noncompetitive appointments that violated the intent of the Consent Decree. A district court's power to enforce a consent decree includes the power to issue such injunctions for the purpose of preventing further discriminatory actions. *See, e.g., United States v. Microsoft Corp.*, 147 F.3d 935, 943 (CAD.C. 1998) (an injunction, rather than contempt proceedings, can be used to address the contention that a consent decree, properly construed, bars the conduct at issue); *United States v. Western Elec.*, 894 F.2d 430, 434 (CAD.C 1990) ("A district court may adjust the obligations of the parties in response to unforeseen changes in circumstances, *see United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932) (citations omitted), or in response to anticipated changes expressly identified by the parties upon entering the decree, *see, e.g., United States v. American Cyanamid Co.*, 719 F.2d 558, 564-65 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984) (citations omitted)");

Smith v. Miller, 665 F.2d 172, 175-76 (7th Cir. 1981) (affirming district court's exercise of equitable power in effectuating the purposes of federal law).

Likewise, the District Court's decision to enter a declaratory judgment was an appropriate means of avoiding further discrimination and potential contempt by apprising the parties of their rights under the Consent Decree. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) (acknowledging that clarification was appropriate means of addressing problems with consent decree and criticizing defendants for failing to petition the district court for a clarification); *Microsoft Corp.*, 147 F.3d at 942-43 (by granting clarification, the court "construed the petition to contain an implicit request for declaratory relief").

B. *Contempt Proceedings Would Have Been Inappropriate Under the Circumstances of this Case.*

In any circumstance, because the *Reynolds* District Court was faced with a situation that could *not* effectively be addressed through civil contempt proceedings, the strictures retroactively imposed by the Eleventh Circuit were inapposite. Because the noncompetitive appointments obtained through unforeseen uses of the grievance procedure had not yet been implemented, ALDOT's potential contempt was not yet ripe. Moreover, because the grievance procedure was not actually part of the Consent Decree, use of the grievance procedure to obtain those appointments arguably would not have violated a specific express term of the Consent Decree, but rather would have circumvented the terms of the Consent Decree and thereby frustrated its purpose. *See Reynolds v. ALDOT*, 996 F. Supp. at 1132, 1137-38 ("use of the grievance process in this manner perpetuates practices forbidden by Consent Decree I" and "defeats a primary goal of the consent decree"). The District Court could not properly have found ALDOT in contempt without clear and convincing evidence that an express provision of the Consent Decree unambiguously had been violated. *See Jove Engineering Inc.*, 92 F.3d 1539, 1545-46 (CA11 1996)

(finding of contempt requires clear and convincing evidence that the underlying order has been violated); *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (CA2 1995) (resorting to contempt is not proper when there is doubt as to the wrongful nature of a defendant's conduct). *See also Microsoft Corp.*, 147 F.3d at 943 (finding contempt inappropriate in the absence of a finding that conduct was unambiguously barred by the consent decree); *Gregory v. Depte*, 896 F.2d 31, 37 (CA3 1990) (Becker, J., concurring) ("if the underlying order has yet to be violated, then what purports to be a contempt sanction is more correctly treated as a declaratory judgment").

Holding ALDOT in contempt as a means of addressing unforeseen uses of the grievance procedure to award noncompetitive appointments contrary to the intent of the Consent Decree would have been especially inappropriate in light of the fact that ALDOT itself "first brought to the attention of the court the matter of whether certain employees and supervisors were entering into improper grievance settlements." *Reynolds*, 996 F. Supp. at 1155. The District Court entered a preliminary injunction to forestall potentially improper appointments until it could address the issue whether such awards under the grievance procedure vitiated the Consent Decree's competitive appointment requirements in response to *both* parties' concerns. *Id.* at 1137; Pet. App. G, 207a. Given that both Plaintiffs and ALDOT had requested clarification, a declaratory judgment ultimately was the most effective and least pejorative way to address unforeseen uses of the grievance procedure to effect discriminatory, noncompetitive appointments.

II. The Eleventh Circuit Denied Plaintiffs' Counsel Fundamental Due Process When It Held That Counsel's Conduct Was Abusive and Required Plaintiffs' Counsel to Show Cause As to Why Section 1927 Sanctions Should Not Be Imposed.

A writ of certiorari should be granted to review the Eleventh Circuit's failure to accord Plaintiffs' counsel fundamental due process rights with respect to the court's determination that counsel had engaged in abusive conduct implicating sanctions under 28 U.S.C. § 1927, which penalizes "unreasonable and vexatious multiplication of proceedings."[9] Sanctions appropriately are imposed under Section 1927 only after notice to counsel and opportunity for counsel to be heard on the issue of allegedly sanctionable conduct. *Roadway Express v. Piper*, 447 U.S. 752, 767 (1980). In spite of this constitutional mandate, and although neither Defendants, nor Intervenors, nor the District Court had raised any issue of sanctionable behavior, the Eleventh Circuit spontaneously considered whether Plaintiffs' counsel should be sanctioned under Section 1927 for conduct in the District Court below and required that counsel show cause before a district court, *other than the one before which the allegedly sanctionable conduct had occurred*, as to why his conduct should not be sanctioned. *Reynolds*, 207 F.3d at 1299. Without the benefit of briefing or citation to the record, and without providing counsel even the most rudimentary due process, the Eleventh Circuit made the factual finding that counsel had invited error, abused judicial process, and asserted baseless arguments in connection with the Plaintiffs' request for a preliminary injunction barring implementation of noncompetitive appointments. *Reynolds*, 207 F.3d at 1299. By this holding, the Eleventh Circuit court exceeded the scope of its appellate authority and entirely disregarded both due process and the appropriate standard for imposing sanctions under Section 1927.

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9. Section 1927 provides that an attorney may be required to "satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred" because of counsel's unreasonable and vexatious multiplication of proceedings. 28 U.S.C. § 1927.

A. *The Eleventh Circuit Exceeded the Scope of Its Authority in Finding That Plaintiffs' Counsel Abused Judicial Process.*

After hearing arguments and receiving briefs on the Intervenors' appeal of the District Court's injunction and declaratory judgment, the Eleventh Circuit, on its own initiative, considered the extraneous matter of Plaintiffs' counsel's conduct in the District Court litigation preceding the Intervenors' appeal, and made the factual determination that Plaintiffs' counsel had acted improperly. Because none of the parties had briefed, argued, or even anticipated this issue, the Eleventh Circuit's startling decision necessarily was based on an incomplete record and, as it happened, a flawed understanding of facts found by the District Court and the procedural history in the District Court. The appellate court did not have the authority to make findings of fact with regard to behavior that occurred before the District Court, but rather was required to defer to the District Court's factual determinations. *See infra*, section III. A. The District Court has never raised the issue of sanctions under Section 1927 and has never disputed the propriety of Plaintiffs' counsel's conduct. *Cf. Reynolds*, 207 F.3d at 1302 (Story, J., dissenting in part) (discussing Plaintiffs' counsel's "legitimate concern" regarding violation of the Consent Decree and acknowledging that the "district court apparently shared those concerns").

Section 1927 is not a "catch-all" provision for conduct that a court deems objectionable. *See Peterson v. BMI Refractories*, 124 F.3d 1386, 1395-96 (CA11 1997) ("[T]he provisions of Section 1927, being penal in nature, must be strictly construed.") A Court of Appeals is authorized to find that counsel's conduct warrants imposition of sanctions under Section 1927, only after making specific findings concerning conduct that occurred before that court. *See, e.g., Braley v. Campbell*, 832 F.2d 1504, 1513 (CA10 1987) (listing cases in which appellate courts imposed sanctions for frivolous and vexatious appeals); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc.*, 809

F.2d 626, 638 (CA9 1987) (evaluating the substance of the appeal); *Limerick v. Greenwald*, 749 F.2d 97, 102 (CA1 1984) (appeal itself was frivolous and vexatious). Section 1927 sanctions must be based on express, particularized findings concerning counsel's conduct. *See, e.g., Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 718-19 (CA8 1999) (discussing need for findings of fact in support of a determination of sanctionable conduct); *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 97 (CA2 1997) (court must provide counsel facing sanctions under Section 1927 with "specific notice of the conduct alleged to be sanctionable and the standard by which that conduct will be assessed"); *Braley*, 832 F.2d at 1513 (indicating that there must be an "express basis for imposition" of Section 1927 sanctions). *See also Edwards v. General Motors Corp.*, 153 F.3d 242, 246 (CA5 1998) (sanctions under Section 1927 must be "predicated on actions that are both 'unreasonable' and 'vexatious' . . . [and] evidence of bad faith, improper motive, or reckless disregard of the duty owed to the court.") (citation omitted); *Avirgan v. Hull*, 932 F.2d 1572, 1582 (CA11 1991) (sanctions for willful abuse of judicial process are appropriate only upon finding conduct tantamount to bad faith).

The Eleventh Circuit's findings relate primarily to its view of conduct that occurred before the District Court. The Eleventh Circuit held that counsel's conduct in the District Court below constituted abuse of judicial process and invitation to error (later defended, the court suggested, by baseless argument). *Reynolds*, 207 F.3d at 1299. The findings that the Court proffered as a basis for its holding were based on an inaccurate reading of the record and, in any circumstances, were beyond the Eleventh Circuit's authority, as they concerned conduct which occurred before the District Court and which had not been raised by any of the parties or the District Court.

B. *The Eleventh Circuit Violated Counsel's Constitutional Rights by Finding That Counsel Had Engaged in Sanctionable Conduct without Affording Counsel Even the Most Basic Due Process.*

Plaintiffs' counsel first became aware that his conduct was alleged to be improper only upon reading the Eleventh Circuit's opinion, which not only raised the issue of counsel's conduct on its own initiative, but also actually *held* that counsel's conduct had been improper. The Court's failure to provide counsel with notice and an opportunity to be heard on the issue of sanctionable conduct violated counsel's constitutional right to due process.

The fundamental elements of due process entail (1) notice that the court is considering the issue of sanctions, and (2) an opportunity to respond to the court's concerns.[10] *See Braley*, 832 F.2d at 1514. *See also Chambers v. Nasco, Inc.*, 501 U.S. 32, 50 (1991); *Roadway Express*, 447 U.S. at 767; *Thornton v. General Motors Corp.*, 136 F.3d 450, 455 (CA5 1998); *Larsen v. City of Beloit*, 130 F.3d 1278, 1286 (CA7 1997); *Sakon v. Andreo*, 119 F.3d 109, 114 (CA2 1997). To satisfy due process requirements, notice must be sufficiently "particularized . . . that a party is aware of the particular factors that he must address if he is to avoid sanctions." *Angelino v. N.Y. Times Co.*, 200 F.3d 73, 100 (CA3 1999) (citation and punctuation omitted). *See also 60 East 80th St. Equities v. Sapir* (*In re 60 East 80th Street Equities*), 218 F.3d 109, 118 (CA2 2000) (finding that repeated express warnings from the bench constituted "reasonable and adequate" notice, but indicating that advance written notice of the possibility of sanctions is "ordinarily . . . preferable").

Plaintiffs' counsel received absolutely no notice that the Eleventh Circuit would consider whether counsel's conduct was

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10. In discussing an amendment to Section 1927, Congress in 1980 expressly indicated that an attorney facing potential sanctions under Section 1927 was entitled to the protections of due process. *See* H.R. 96-1234, 96th Congress, 1980, reprinted in USCCAN, Vol. 3, 2712, 2780 (1980).

subject to sanctions under Section 1927. Counsel never had an opportunity to address the factual misapprehensions on which the court's determination that counsel had engaged in culpable conduct was based,[11] and has not yet been afforded any opportunity to dispute or otherwise respond to the Eleventh Circuit's "findings." Counsel was denied even the most basic due process rights. That Plaintiffs' counsel *prevailed* before the District Court further compounds this wrong.

Furthermore, by remanding the issue of whether sanctions should be imposed to a district court other than the *Reynolds* District Court, before which the allegedly improper conduct occurred, the Eleventh Circuit placed the district court to which the matter was remanded in the untenable position of determining appropriate sanctions on the basis of the Eleventh Circuit's findings, which the Court lacked authority to make and which manifestly are not supported by the record. The district court to which the Section 1927 issues were remanded has indicated that it will proceed "against this background and these findings," *i.e.* — that the Eleventh Circuit's findings that Plaintiffs' counsel inappropriately sought

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11. For example, the Eleventh Circuit wrongly stated that Plaintiffs failed to move for contempt, *Reynolds*, 207 F.3d at 1298, when Plaintiffs *had* first moved for contempt and only moved for the preliminary injunction at issue to prevent implementation of noncompetitive appointments that violated the purpose of the Consent Decree. *See Reynolds*, 84 F. Supp.2d at 1341 (discussing Plaintiffs' 1997 motion for civil contempt). The Circuit Court also repeatedly stated that the District Court granted, at Plaintiffs' behest, an injunction barring only white employees from using the grievance procedure. *Reynolds*, 207 F.3d at 1294 n.4, 1296-1300. In fact, the District Court enjoined implementation of noncompetitive appointments in grievances filed by both white and black ALDOT employees. *See Reynolds*, 996 F. Supp. at 1151-1156. In a further departure from the record, the Eleventh Circuit relied heavily on the notion that there was no finding of injury to the Plaintiff class, *Reynolds*, 207 F.3d at 1299, in the face of the District Court's express finding, based on extensive record evidence, that the Plaintiff class both was and would be injured by implementation of the grievance awards at issue. *See Reynolds*, 996 F. Supp. at 1152.

injunctive relief by falsely claiming that the grievance procedure violated the consent decree, invited error by requesting such injunctive relief, "were actually representing no one but themselves," and "attempted to defend the district court's ruling on appeal with baseless arguments," are binding in future proceedings. Pet. App. F.

Plaintiffs' counsel thus faces a mandatory show cause hearing, to be conducted on the basis of the Eleventh Circuit's unsolicited determination that counsel engaged in abusive behavior before the *Reynolds* District Court, without the benefit of the due process protections to which he constitutionally is entitled. Counsel was not provided notice that he was charged with inviting error, abusing judicial process, or asserting baseless claims, much less with unreasonably and vexatiously multiplying proceedings, and had no opportunity to be heard on the issue of whether his behavior was culpable.

III. The Eleventh Circuit Exceeded Its Authority by Disregarding the District Court's Factual Findings.

The Eleventh Circuit strayed far from the proper course of judicial proceedings in reversing the *Reynolds* decision on the basis of the Court's own construction of the record. *See Reynolds*, 207 F.3d at 1302. Courts of Appeal are bound to defer to the construction of record evidence that supports the trial court's judgment. *See Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985) (citing *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)). The *Reynolds* District Court provided injunctive and declaratory relief on the basis of specific findings, grounded in substantial documentary and testimonial evidence, that the Plaintiff class would be injured by implementation of noncompetitive appointments awarded under the grievance procedure. *See Reynolds*, 996 F. Supp. at 1152. Nonetheless, the Eleventh Circuit Court did not defer to the District Court's particularized findings of fact, but rather relied on its own assumptions about the evidence in the record to hold that the District Court should have granted neither an injunction nor a

declaratory judgment. This Court should grant a writ of certiorari to clarify the limits of appellate authority to engage in fact-finding.

A. *The Eleventh Circuit Did Not Grant the Requisite Deference to the District Court's Findings of Fact.*

Appellate courts have very limited fact-finding jurisdiction and are authorized only to determine whether factual findings made by district courts are "clearly erroneous." *See* Fed. R. Civ. P. 52(a); *Anderson*, 470 U.S. at 574; *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975). An appellate court is *not* empowered to consider whether, based on the record evidence, it would have made the same factual determination as did the court below: "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *See Anderson*, 470 U.S. at 573-74 (citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949), and *Inwood Lab., Inc. v. Ives Lab., Inc.*, 456 U.S. 844 (1982)) (finding that the Eleventh Circuit misapprehended and misapplied the clearly erroneous standard when it held that the district court erred in finding discrimination on the basis of gender).

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

Id. at 574-75.

This Court repeatedly has indicated that appellate courts must apply a deferential standard of review to factual findings

by district courts. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399-401 (1990) (O'Connor, J.) (requiring appellate court to apply deferential standard because trial court's decision to impose Rule 11 sanctions involved findings of fact); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (Rehnquist, J.) ("Court of Appeals was mistaken" when it made factual determinations and should instead have remanded so the district court could make additional findings or set aside the district court's findings as "clearly erroneous") (quoting *Anderson*, 470 U.S. at 574-75); *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (Rehnquist, J.) (federal habeas corpus statute does not give appellate courts license to redetermine the factual matter of credibility of witnesses) (citing *United States v. Oregon Medical Society*, 343 U.S. 326 (1952)). Likewise, federal courts of appeal have acknowledged the deference due a district court's findings of fact. *See, e.g., Green v. School Bd. of Hillsborough County*, 25 F.3d 974, 977 (CA11 1994) (giving "substantial deference" to district court's factual decisions in Title VII disparate treatment suit); *Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036, 1045 (CA7 1991) (district court's decision regarding "selection of the appropriate variables . . . is generally a question of fact and is reversible only if clearly erroneous"); *Bundy v. Jackson*, 641 F.2d 934, 950 (CAD.C. 1981) ("we must affirm the trial court's conclusion on the question of discrimination if the so-called 'subsidiary facts' are not clearly erroneous, if the inferences drawn from them are reasonable, and if the findings and inferences reasonably support the 'ultimate' factual finding on discrimination").

The Eleventh Circuit Court disregarded the District Court's factual determination that the Plaintiff class would suffer injury in the absence of injunctive relief, *see Reynolds*, 996 F. Supp. at 1152, and substituted its own finding that implementation of the challenged grievance recommendations would have "injured no member of a plaintiff class on account of race or in any other way." *Reynolds*, 207 F.3d at 1299. The court's ultimate decision to vacate the District Court's preliminary injunction and

declaratory judgment stems from its own "redetermination" of the facts. This failure either to defer to the trial court's findings of fact or to set aside those findings as "clearly erroneous," justifies granting of a writ of certiorari.

B. *The District Court Relied on Substantial Record Evidence to Find That the Plaintiff Class Would Be Injured by Implementation of Noncompetitive Appointments Through the Grievance Procedure.*

The record demonstrates not only that the District Court found injury to the Plaintiff class, but also that the findings of injury were based on substantial evidence. Plaintiffs established injuries to individual class members (including Plaintiff Reynolds) who were denied an opportunity to compete for jobs, through stipulations of fact, R142-204-205; R137-682-687; R141-186-190, 196-197, and through the testimony of seven class members and a top official of ALDOT. *See, e.g.,* R134-72; R135-301-305; R136-486-492, 562-73, 588-89, 595-96, 617-25, 646-48, 635-36; R135-234-38, 282-83. The Intervenors who brought the appeal on which the Eleventh Circuit ruled did not contest that the Plaintiff class was adversely affected. *See Reynolds*, 996 F. Supp. at 1152; R134-72, R137-682-685; R142-204-205.

In spite of the District Court's findings, which were amply supported by the record, the Eleventh Circuit presumed that the District Court had intended to prohibit only *white* employees' use of the grievance procedure. *Reynolds,* 207 F.3d at 1297. Accordingly, the court opted to "treat" the declaratory judgment as barring only "non-black" uses of the grievance procedure. *Id.* The court bolstered its presumption with the mistaken belief that the trial court was concerned only with possible injury to class members "at some unforeseen time in the future," and further peremptorily stated that "it follows inexorably that, in the court's view, allowing *any* non-black to invoke the grievance procedure – even if it caused a plaintiff class member no injury – would violate the decree." *Reynolds*, 207 F.3d at 1297 n.18. The record shows, however, that the District Court found both

that class members were *currently injured* by unforeseen uses of the grievance procedure and that class members would suffer irreparable harm if those uses were allowed to continue. *See Reynolds*, 996 F. Supp. at 1149, 1152. The District Court heard and expressly rejected the contention that black grievants were allowed to obtain noncompetitive appointments through the grievance procedure at issue,[12] *see id.* at 1149, and enjoined grievances seeking noncompetitive appointments whether brought by white or black employees. *Id.*; R18-1726; R141-4, 62-64.

The Eleventh Circuit's mistaken interpretation of the voluminous record led the court to assume that the District Court had modified the Consent Decree – "rewrit[ing] the contract" so as to deny a race-neutral benefit to all but black employees. *Reynolds*, 207 F.3d at 1297 n.18, 1300. The court stressed that it considered the Consent Decree as a contract that should be construed using "the normal tools for interpreting contracts," *id.* at 1300, and then, on the erroneous basis that the grievance procedure was a part of the Consent Decree, concluded that the District Court had no right to alter an unambiguous term of the contract. *Id.* at 1301. However, as explained above, while the Consent Decree indicated that a grievance procedure would be established, a particular procedure was not incorporated into the decree. The District Court thus did not amend or rewrite the Consent Decree by declaring that use of the grievance procedure to obtain noncompetitive appointments circumvented the intent

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12. The Hinton and Sims grievances referenced by the court were brought under a procedure predating that here at issue and included findings of racial discrimination. *See* R20-2475-39-43; R12-1200-34; R11-1091; R14-1427; *see also* R10-1034; R11-1086, 1091; R12-1212; R14-1427; R15-1512; R6-599A; R12-1200, 1231, 1241, 1282, 1285; R13-1294, 1299. The language cited by the court, *Reynolds*, 207 F.3d 1295, n. 10, to support its conclusion that resolution of the Sims grievance was not based on findings of racial discrimination came from a secondary proceeding focused on the defendants' "hiring freeze" defense – after a prior hearing found discrimination on the basis of race.

of the Consent Decree. Construing the grievance procedure to insure that it was consistent with the spirit of the Consent Decree thus did not alter the Consent Decree itself.

The Eleventh Circuit further disregarded the District Court's findings by concluding, on the basis of its own assumptions about the evidence, that the District Court had established disparate standards for "black" and "non-black" grievants. The source of this apparent hostility to the Consent Decree here at issue, and to the District Court's declaratory judgment that a particular use of the grievance procedure violated that decree, is difficult to discern. The District Court did *not* establish disparate standards on the basis of race, but simply made the race-neutral declaration that *certain unforeseen uses* of the grievance procedure perpetuated noncompetitive job selection in violation of the Consent Decree. *See Reynolds*, 996 F. Supp. at 1140-41. The Consent Decree itself was race-neutral, and altogether avoided use of quotas and race-based preferences. The "black" / "non-black" distinction upon which the Eleventh Circuit so heavily relied stems from the way the court opted to "treat" the judgment, rather than the judgment itself.

IV. The Eleventh Circuit Exceeded Its Authority Under 28 U.S.C. § 2106 by Overruling Orders Which Were Not Before the Court.

The Eleventh Circuit further overstepped its appellate authority by overruling district court judgments which had not been appealed and by directing that orders which were not properly before the Court should be nullified, instructing the District Court "to restore the case to the status quo ante, which means nothing has happened in this case since August 9, 1995 . . ."[13] *Reynolds*, 207 F.3d at 1302. An appellate court's authority

13. August 9, 1995, is the date the revised grievance procedure was approved by the District Court. On remand, the District Court has issued an order construing the Eleventh Circuit's reference to "this case" to require that only matters dealing with the particular grievances here at issue be returned to the "status quo ante." *Reynolds v. ALDOT*, (Cont'd)

over proceedings in district courts is set out in 28 U.S.C. § 2106, which provides that

> [t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court *lawfully brought before it for review*, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such *further* proceedings to be had as may be just under the circumstances.

(Emphasis added). The Eleventh Circuit's order vastly exceeds this authority by purporting to direct the District Court to vacate orders that were not before the Eleventh Circuit for review, including orders entered long before the orders which *were* appealed had been issued, without any finding of legal error.

District courts are not the

> creatures and agents of [the appellate courts] whose work [the appellate court] may reject and send back for redoing at [the court's] own pleasure. . . . [An appellate court] cannot . . . "reverse" a judgment of one of the [district courts] "and direct the entry" of a different judgment whenever [the appellate court] disagree[s] with what has been done, but only when [the appellate court] can identify a controlling error of law.

Stutson v. United States, 516 U.S. 163, 178-79 (1996) (Scalia, J., dissenting) (citing 28 U.S.C. § 2106). The Eleventh Circuit

(Cont'd)
No. 4411, slip op. (M.D. Ala. April 18, 2000). This effort to give the Court of Appeals' language a more defensible basis, however, does not cure the error. First, the Eleventh Circuit's decision still casts unwarranted doubt on the validity of hundreds of orders, even if the District Court has declined to give it that effect. The Court of Appeals may yet attack the District Court's order as inconsistent with its order here. Second, the District Court's narrowed construction still permits the Eleventh Circuit's order to impact matters that were not before it on appeal.

had no authority to direct the nullification of orders that were not before it for review. A writ of certiorari should be granted to correct that error. Even if the Eleventh Circuit's order could be construed so as to avoid impinging on the proper limits of its jurisdiction, to order the District Court to restore a civil rights action to the "status quo ante," negating over four years of district court litigation and vacating scores of district court orders, without any regard for prejudice to the parties and without identifying any legal error in the orders affected by such a sweeping directive, so far exceeds the bounds of prudent appellate authority as to justify granting of certiorari.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant a writ of certiorari and review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No. 00-

IN THE

Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,

Petitioners,

-and-

CECIL PARKER, *et al.*,

Petitioners,

v.

G. M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6347
D.C. Docket No. CV 85-T-665-N

JOHNNY REYNOLDS, individually on behalf of himself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated,

Plaintiff-Appellee,

CECIL PARKER, ROBERT JOHNSON, et al.,

Intervenors-Plaintiffs-Appellees,

C. CAMPBELL WILSON,

Intervenor-Plaintiff,

WILLIAM ADAMS, CHERYL CAINE, et al.,

Intervenors-Plaintiffs-Appellants,

versus

G.M. ROBERTS, in his official capacity as Director for the Alabama Department of Transportation, et al.,

Defendants.

Appendix A

No. 98-6192
D.C. Docket No. 85-00665-CV-T-N

JOHNNY REYNOLDS, individually and on behalf of himself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated,

Plaintiff-Appellee,

CECIL PARKER; ROBERT JOHNSON, et al.,

Intervenors-Plaintiffs-Appellees,

WILLIAM ADAMS, CHERYL CAINE, et al.,

Intervenors-Plaintiffs-Appellants,

versus

G.M. ROBERTS, in his official capacity as Director for the Alabama Department of Transportation, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Middle District of Alabama

(March 29, 2000)

Before TJOFLAT and DUBINA, Circuit Judges, and STORY*, District Judge.

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* Honorable Richard W. Story, U.S. District Judge for the Northern District of Georgia, sitting by designation.

Appendix A

TJOFLAT, Circuit Judge:

These consolidated appeals arise out of a long-standing racial discrimination class action brought by African-American employees and job applicants against the Alabama Department of Transportation (the "Department"). Three years after the district court entered a race-neutral consent decree providing for prospective relief relating to job qualifications and promotion criteria, plaintiffs' counsel, using the class action as their vehicle, applied to the district court for preliminary and permanent injunctions prohibiting white employees of the Department from availing themselves of a race-neutral grievance procedure the parties had fashioned and the court had approved. The court granted counsel's application for a preliminary injunction, but, recognizing that the issuance of an order to show cause rather than an injunction is the appropriate device for enforcing a consent decree, denied counsel's application for a permanent injunction. In the same stroke, the court, intent on granting counsel the relief they sought, transformed their application for a permanent injunction into an application for a declaratory judgment, declaring that allowing non-black employees to use the race-neutral grievance procedure violates the consent decree. *Reynolds v. Alabama Dep't of Transp.*, 996 F. Supp. 1130 (M.D. Ala. 1998). In No. 97-6347, a class of intervenors, who consist of the Department's non-black employees (the "Adams Intervenors"), appeals the preliminary injunction. In No. 98-6192, the same class appeals the declaratory judgment. We vacate both orders and instruct the district court to restore the *status quo ante*.

Appendix A

I.

A.

The procedural history of this case is set out in our opinion in *Reynolds v. Roberts*, 202 F.3d 1303, 1305-11 (11th Cir. 2000) (*Reynolds I*). Here, we recite a shortened version of that history and then focus on the events relevant to this appeal.

The named plaintiffs brought this suit against the Department[1] in May 1985 on behalf of all black employees and former employees of the Department and all unsuccessful black applicants for positions within the Department. Alleging race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, 42 U.S.C. § 1981, and the Equal Protection Clause of the Fourteenth Amendment, plaintiffs sought monetary and injunctive relief under those statutes and under 42 U.S.C. § 1983. In October 1986, the court certified three plaintiff classes.[2]

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1. In addition to the Department, the plaintiffs sued various state officials. The lawsuit was styled initially as *Reynolds v. King*. It became *Reynolds v. Roberts*, then *Reynolds v. Alabama Department of Transportation*. The case came to this court styled *Reynolds v. Butts*; Butts was the director of the Department when the Adams Intervenors took this appeal. He was replaced as director by G.M. Roberts. We refer to the defendants in this case collectively as the Department.

2. The first class consisted of any black person who unsuccessfully applied for a merit position in the Department at any

(Cont'd)

Appendix A

After the parties joined issue, and engaged in discovery, they entered into settlement negotiations. In 1988, and again in 1991, they presented a proposed consent decree to the district court for approval. On each occasion, some members of the plaintiff classes objected to the entry of the decree; the district court sustained their objections and refused to enter the decree.

In June 1992, the case proceeded to trial before the court. Near the end of the plaintiffs' case, the parties asked the court to recess the proceeding indefinitely so they could engage in further settlement negotiations. The court granted their request. In November 1993, the parties reached a partial settlement, in the form of a proposed consent decree. The proposed decree provided a range of prospective class-wide injunctive relief. Among other things, it set hiring and promotion quotas for blacks — 33% of the positions in each job classification in the Department would be set aside for blacks. To ensure an adequate pool for this set-aside program, the decree directed the Department to mount an aggressive recruiting campaign at historically black colleges and universities. Finally, the decree required the Department to establish a grievance procedure for its employees.

(Cont'd)
time after May 21, 1979. The second class included all blacks employed by the Department at any time after May 21, 1979, who were permanent employees under the Department's merit system (the "merit" employees) and therefore eligible for, but had been denied, promotion. The third class consisted of a portion of the blacks employed by the Department at any time after May 21, 1979, as temporary employees (the "non-merit" employees). During their employment in the Department, these employees had applied for, but had been denied, merit positions.

Appendix A

The parties presented the proposed decree to the district court, which, in turn, scheduled a hearing for January 19, 1994, to entertain any objections members of the plaintiff classes, or others likely to be affected (like white employees of the Department), might have to the terms of the proposed decree. On January 13, a group of white Department employees (the "Adams Intervenors") moved the court for leave to intervene on behalf of the Department's non-black employees in order to challenge the race-conscious provisions of the proposed decree — specifically, the 33% quota requirement for all job classifications in the Department. The court granted the motion, *Reynolds v. Roberts*, 846 F. Supp. 948, 953-54 (M.D. Ala. 1994), and subsequently certified an additional class, consisting of the Department's non-black employees.

The January 19 hearing was held as scheduled. Over 200 people attended the hearing, including many non-black employees of the Department. The objections to the race-conscious aspects of the proposed consent decree were such that the parties withdrew it and, with leave of court, went back to the drawing board. By late February 1994, the plaintiffs and the Department decided to divide the previously proposed decree into three parts, called Consent Decrees I, II, and III. Consent Decree I contained the provisions that all sides agreed provided only race-neutral prospective relief. Consent Decrees II and III contained provisions that were acceptable to the plaintiffs and the Department, but opposed as race-conscious by the Adams Intervenors.

Appendix A

The parties submitted Consent Decree I to the district court for approval, and, on March 7, the court held a hearing on the fairness of the proposal. No one other than the parties' attorneys appeared at the hearing, and no one objected to the entry of the decree. The court approved the decree and, by order entered March 16, 1994, adopted it in full.

B.

Consent Decree I is composed of a series of "Articles" which revamped the process by which the Department hires, promotes, classifies, and pays its employees. The decree abolished the system of "employment registers" from which positions were filled and promotions were granted, and created new qualifications and procedures for hiring and promotion. It also created new procedures for, among other things, rotation of job duties, recruitment, and training. None of the Articles of Consent Decree I provide special benefits or procedures for black employees of the Department.

The only Articles relevant to this appeal are Article 15 and one provision of Article 19. Article 15 required the Department to conduct a study of all its employees (regardless of race) to determine if any employees were being assigned duties associated with a higher job classification (and thus higher pay level) than the one they currently had. If the study uncovered an employee "spending a majority of [his or her] working time in the performance of the duties and responsibilities of a higher job classification," the Department was required to reclassify the employee at the higher level (and therefore increase that employee's salary). Article 15 also required the Department "to monitor the

duties and responsibilities performed by employees with the goal of assuring to the extent practicable that at least 90% of the duties and responsibilities performed by employees on a regular or non-emergency basis are within the job description for [the] job they are holding."

To ensure that the Department was fulfilling Article 15's obligations (as well as other obligations) under Consent Decree I, Article 19 mandated the creation of a grievance[3] procedure that individual employees could use:

> Within 180 days of the effective date of this Decree, the Highway Department will develop and implement an enhanced complaint procedure which assures that all discrimination complaints are processed without fear and reprisal within established time limits and that appropriate action is taken following [the resolution of a complaint]. Such procedure will be submitted to plaintiffs' counsel for review and comment at least 30 days prior to its implementation.

The Department complied with this mandate and submitted a proposed complaint procedure, designated the "Revised Complaint Procedure," to plaintiffs' counsel for review. Plaintiffs' counsel approved the procedure. Although Article

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3. Both Consent Decree I and the Revised Complaint Procedure use the words "grievance" and "complaint" interchangeably. Throughout this opinion we use the term "grievance." We use the term "grievant," as did the district court, to refer to an employee who has filed a grievance under the procedure.

19 did not require it to do so, the Department submitted the procedure to the district court. On August 9, 1995, the court incorporated the procedure in an "Order and Injunction."[4]

The grievance procedure is race-neutral. It opens by stating that "[t]he Consent Decree and Departmental policy mandate that all employees enjoy a work-place free from discrimination." The procedure allows a grievance to be filed for any "alleged wrong based upon the employee's race, color, creed, sex, national origin, age, or handicap." Moreover, it allows grievances for "a violation of the Consent Decree, or arising from matters that are the subject of the Consent Decree." The procedure is available to the Department's employees without regard to race.[5]

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4. In its order, the court stated that "[c]ounsel for the plaintiffs have informed us that they agree to [the proposed grievance procedure]." We therefore assume that the Department "submitted [it] to plaintiffs' counsel for review and comment at least 30 days prior to its implementation," as required by Article 19.

The court did not indicate, in its order, whether counsel for the Adams Intervenors had agreed to the procedure. The record does not reveal any contemporaneous objection by the Adams Intervenors. On appeal, the Adams Intervenors do not challenge the grievance procedure itself, only the district court's subsequent action precluding non-black employees from utilizing it.

5. The Revised Complaint Procedure is also available to "any . . . employee who has been terminated . . . or applicant for full-time employment." The complaint procedure, however, provides no mechanism for a former employee or applicant to file a grievance. Rather, the mechanism that is provided applies only to current employees.

Appendix A

The grievance procedure consists of four steps. In step one, a grievance is submitted to an employee's immediate supervisor. The supervisor responds in writing with a proposed resolution, which may or may not be accepted by the grievant. If the grievance cannot be resolved, it is submitted in step two to the Department's appointed Equal Employment Opportunity ("EEO") Monitor, who also proposes a solution. If the grievant finds the solution unacceptable, the process moves to step three. Step three is a formal hearing within the Department, conducted by the Department's "Hearing Officer."[6] If the matter is still not resolved, then, at step four, either party may seek arbitration before "an external arbitrator . . . selected from a panel of Seven (7) arbitrators, with Three (3) of such panel members to be designated by class counsel, Three (3) to be designated by the Department, and One (1) to be designated by agreement among the other Six." An employee with a grievance is not required to invoke the Revised Complaint Procedure; as the procedure states, an employee may file an "administrative charge or separate legal action" instead.[7]

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6. A Hearing Officer is taken in sequence from a list of Hearing Officers agreed to by both the Department and plaintiffs' counsel.

7. In regards to the external arbitration at step four, the grievance procedure states:

> The findings and orders of the arbitrator shall be final from which no appeal may be taken in the context of the *Reynolds* case. Nothing in this procedure, however, shall be construed to prevent the filing of any administrative charge or separate legal action. In the event that class counsel deems the outcome of the

(Cont'd)

Appendix A

C.

As noted, Consent Decree I requires the Department, "to the extent practicable," to assure that employees are performing the duties within their job classification and are not being assigned extra duties without compensation. By 1996, a number of black employees of the Department had filed grievances alleging that the Department had assigned them out-of-classification duties. They sought back pay and/or a "provisional appointment"[8] to the position whose duties they were actually performing. At least two of these grievances eventually made their way to the district court for a ruling,[9]

(Cont'd)

> arbitration to constitute a violation of Consent Decree I, class counsel may file a motion . . . for relief [with] the Court.

The record does not indicate how the parties or the court believed the first sentence of the above provision, which allows "no appeal," to be consistent with the third sentence, allowing "class counsel" to "file a motion . . . for relief [with] the Court" whenever "class counsel deems the outcome of the arbitration to constitute a violation of Consent Decree I."

8. As best we can discern from the record, a "provisional appointment" is simply a temporary promotion to a higher job classification. The provisional appointment apparently expires when the higher position is permanently filled through the competitive selection procedures mandated by Consent Decree I.

9. These grievances of black employees came before the court in the following manner. The original Complaint Procedure

(Cont'd)

and, in both, the court ordered back pay and issued an injunction mandating a provisional appointment for the employee. In neither of these grievances did the district court make a finding that the grievant had been the victim of discrimination — the court only found that they had been performing duties outside their job classification, in violation of Article 15.[10]

In late 1996, three white employees of the Department ("the white grievants") filed grievances alleging that they

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(Cont'd)
negotiated between the parties (but not presented to the district court for approval) allowed any dissatisfied grievant to file a separate motion for relief with the district court. The grievances of the black employees described in the text were brought before the district court pursuant to this procedure; the district court appointed a special master to take evidence and issue recommendations. At the same time, the court stated that it would not continue to be what it described as a "super personnel board" and instructed the parties to revise the Complaint Procedure to "remove the court from the process." *Reynolds*, 996 F. Supp. at 1144 n.40. This resulted in the parties negotiating the Revised Complaint Procedure and submitting it to the district court for approval. *See id.* As this appeal indicates, the district court was unsuccessful in "remov[ing itself] from the process." *Id.*

10. One of the district court's injunctive orders awarding a provisional appointment and back pay to a black grievant indicates that the Department opposed the award because the grievant had not proven that he had been assigned work out-of-classification because of his race. The district court dismissed the Department's position: "[A black grievant] has no obligation to show that the [D]epartment acted in a discriminatory manner, only that they failed to conform to the decree."

too had been assigned duties outside their classification in violation of Article 15.[11] They sought back pay and provisional appointments. The employees' supervisor (all three apparently had the same supervisor) did not provide a satisfactory resolution, and a single hearing for all three grievants was held before the Department's EEO Monitor. The EEO Monitor recommended back pay and provisional appointments for all three, a resolution which was accepted by the white grievants.

D.

On February 26, 1997, counsel for the three plaintiff classes ("plaintiffs' counsel") moved the district court for a temporary restraining order ("TRO") to prevent the Department from implementing the three grievance resolutions.[12] They alleged that, if the EEO Monitor's

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11. The white grievants did not allege that they had been assigned duties outside their classification because of their race.

12. As explained *supra* note 2, the plaintiff classes were made up of (1) unsuccessful applicants for merit positions with the Department; (2) merit employees who had been denied promotion(s) in the Department; and (3) non-merit employees who had been denied merit positions. The second and third classes included both former and current employees of the Department.

It is obvious that the Department's Revised Complaint Procedure is inapplicable to the first plaintiff class and to the former employees in the second and third plaintiff classes. *See supra* n.5 and accompanying text. The procedure applies, instead, to current employees in the second and third classes and, of course, to the Department's future employees.

(Cont'd)

resolution of the grievances were implemented, the Department would be violating Consent Decree I. The next day, the court conferred with plaintiffs' counsel and the Department's attorneys by telephone;[13] later that day, it issued a TRO which enjoined the Department from implementing the three grievance resolutions. On March 10, plaintiffs' counsel applied for a preliminary injunction and asked the court to extend the TRO until their application could be heard. After another telephone conference with the attorneys, the court extended the TRO and scheduled a hearing for March 24 on the application for a preliminary injunction.[14]

The hearing was held as scheduled. On April 9, 1997, the court "preliminarily ENJOINED and RESTRAINED" the

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Accordingly, when plaintiffs' counsel applied to the district court for the preliminary and permanent injunctive relief involved in this appeal (although they did not indicate as much), they were not representing members of the first plaintiff class or former employees in the second and third plaintiff classes.

13. There is no indication in the record that the three white grievants were notified of plaintiffs' counsel's application for a TRO or that they were represented by counsel in the telephone conference with the court. Accordingly, the TRO issued without notice to these grievants. *See* Fed. R. Civ. P. 65(b). The record indicates that counsel for the Adams Intervenors participated in all subsequent hearings on plaintiffs' counsel's applications for injunctive relief (relating to the Revised Complaint Procedure) and acted as counsel for the three white grievants — just as they have in these appeals.

14. The extended TRO would expire on March 24.

Department and its agents "from provisionally appointing, promoting or paying backpay to [the three white grievants]." The Adams Intervenors timely appealed from this preliminary injunction, No. 97-6347.

On March 28, before the court had ruled on the application for a preliminary injunction, plaintiffs' counsel applied for a second preliminary injunction; this time, they asked the court to prevent the Department from processing any grievances by non-black employees. Counsel alleged that allowing any non-blacks to utilize the grievance procedure would violate Consent Decree I. The court treated counsel's application as one for a permanent injunction and held hearings in late April 1997. Eleven months later, on March 3, 1998, while the Adams Intervenors' appeal of the April 9 preliminary injunction was pending in this court, the district court, in a memorandum order, ruled on counsel's application. *See Reynolds*, 996 F. Supp. 1130.[15]

In its March 3, 1998, order, the court did not grant plaintiffs' counsel a permanent injunction; instead, acting *sua sponte*, it gave them declaratory relief.[16] It stated that allowing non-class members to file grievances would be "a tool to allow supervisors again to engage in the secretive

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15. As far as we can tell from the record, the district court did not vacate the preliminary injunction enjoining the Department from implementing the EEO Monitor's resolutions of the white employees' grievances; we assume, therefore, that the preliminary injunction remains in effect against the Department.

16. In none of plaintiffs' motions for injunctive relief did they ask for declaratory relief.

and non-competitive selection and promotion of employees." *Id.* at 1132. The court worried that an employee and supervisor would collude to circumvent the competitive system for employment contemplated by the consent decree: the employee, under the direction of his supervisor, would file a fake "grievance," which would result in the supervisor awarding a provisional appointment and back pay. *Id.* at 1139. Despite this concern, the court concluded that issuing an order enjoining the Department from hearing grievances of non-blacks would be inappropriate. It reached this conclusion because, in *Newman v. Alabama*, 683 F.2d 1312, 1318 (11th Cir. 1982), we instructed that consent decrees, like all injunctions, are to be enforced through the district court's civil contempt power — exercised after (1) the plaintiff moves the court to order the defendant to show cause why he should not be held in contempt for refusing to obey the decree's mandate, (2) the court grants the motion, and (3) the defendant fails to present a lawful excuse for his alleged disobedience — and plaintiffs' counsel had not invoked the court's enforcement power in this manner. Notwithstanding plaintiffs' counsel's failure to move the court for an order to show cause why the Department should not be adjudged in contempt for refusing to comply with Consent Decree I, the court treated counsel as though they had done so — except that instead of entering a permanent injunction against the Department, it entered a declaratory judgment, which (we presume) it fully expected the Department to treat as an injunction.[17] The court stated that

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17. We have no doubt that the Department would treat the declaratory judgment as an injunction, since the declaratory

(Cont'd)

"the plaintiffs' motions for permanent injunctions . . . are granted to the extent that it is declared as follows: Provisionally appointing, promoting, or paying backpay to [the three white grievants] pursuant to the grievances they filed would violate the consent decree."[18] *Reynolds*, 996 F. Supp. at 1156.

(Cont'd)
judgment would appear to foreordain the outcome of a hearing requiring the Department to show cause why it should not be held in contempt for allowing non-black employees to invoke the grievance procedure.

18. As we explain in the text *infra*, the district court had no basis for nullifying the EEO Monitor's resolutions of the three white's grievances; nothing in the record even remotely suggested that the EEO Monitor's resolutions somehow discriminated against a member of any of the plaintiff classes. The court's only reason for entering the judgment was to alleviate its concern that, at some unforeseen time in the future, the Department might use the grievance procedure to reinstitute its racially discriminatory practices. In sum, if the EEO Monitor's resolutions of the three white's grievances did not discriminate against a member of a plaintiff class, but the court nonetheless felt constrained to nullify the resolutions as violative of Consent Decree I, it follows inexorably that, in the court's view, allowing *any* non-black to invoke the grievance procedure — even if it caused a plaintiff class member no injury — would violate the decree. We therefore treat the declaratory judgment as amending the Revised Complaint Procedure so that it applies only to blacks. We assume that, if a non-black employee has a grievance, he or she should resort not to the Revised Complaint Procedure, but to whatever alternative procedure the Department may have devised for the purpose of entertaining the grievance.

Appendix A

The Adams Intervenors appealed this declaratory judgment, No. 98-6192. We consolidated the appeal with their appeal of the preliminary injunction, No. 97-6347. We now vacate both judgments.

II.

Before we consider the merits of the Adams Intervenors' appeals, we think it appropriate to reiterate what we have said in the past as to how injunctions, including consent decrees, are to be enforced. They are enforced through the trial court's civil contempt power. *See In re Grand Jury Proceedings*, 142 F.3d 1416, 1424 (11th Cir. 1998) (injunction); *Newman*, 683 F.2d at 1317-19 (consent decree). If the plaintiff (the party obtaining the writ) believes that the defendant (the enjoined party) is failing to comply with the decree's mandate, the plaintiff moves the court to issue an order to show cause why the defendant should not be adjudged in civil contempt and sanctioned. *See Newman*, 683 F.2d at 1318; *see also Thomason v. Russell Corp.*, 132 F.3d 632, 634 n.4 (11th Cir. 1998); *Wyatt v. Rogers*, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996). The plaintiff's motion cites the injunctive provision at issue and alleges that the defendant has refused to obey its mandate. *See Wyatt*, 92 F.3d at 1078 n.8. If satisfied that the plaintiff's motion states a case of non-compliance, the court orders the defendant to show cause why he should not be held in contempt and schedules a hearing for that purpose.[19] At the hearing, if the plaintiff

19. The court's show cause order may instruct the defendant to file a response; depending on what the defendant says in his response, a hearing may be unnecessary.

proves what he has alleged in his motion for an order to show cause, the court hears from the defendant. At the end of the day, the court determines whether the defendant has complied with the injunctive provision at issue and, if not, the sanction(s) necessary to ensure compliance. *See Newman*, 683 F.2d at 1318.

As the district court appropriately recognized in its March 3, 1998, order granting a declaratory judgment, plaintiffs' counsel did not invoke this time-honored procedure to obtain enforcement of any of the provisions of Consent Decree I or the Order and Injunction, which amended Consent Decree I by approving the Revised Complaint Procedure. The reason why plaintiffs' counsel did not move the court for an order to show cause is obvious: the Department had not disobeyed any of the mandates of the consent decree, as amended, and plaintiffs' counsel could not contend that it had without running afoul of Rule 11 of the Federal Rules of Civil Procedure.[20] What the Department had done was to permit three white employees to invoke the race-neutral grievance procedure (provided by the Revised

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20. Rule 11 states, in pertinent part:

> By presenting to the court . . . a pleading . . . an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law . . . [and] the allegations and other factual contentions have evidentiary support . . . .

Complaint Procedure), and, then, to accept the EEO Monitor's resolutions of the grievances. Instead of seeking enforcement of the consent decree, as amended, through the district court's contempt power, plaintiffs' counsel took another approach, in two steps.

First, they moved the court to prevent the Department from implementing the EEO Monitor's resolutions by entering a TRO and then a preliminary injunction. Second, they moved the court permanently to enjoin the Department from allowing any non-black employee to invoke the grievance procedure. The district court entered the TRO and preliminary injunction counsel requested. Eleven months later, the court transformed counsel's application for a permanent injunction into a request for declaratory relief and granted a declaratory judgment. We turn now to the merits of the Adams Intervenors' appeals, beginning with their appeal of the preliminary injunction.

A.

We do not tarry long in concluding that the district court erred in entering the preliminary injunction barring the Department from implementing the EEO Monitor's resolutions of the white employees' grievances. A court enters a preliminary injunction to prevent the plaintiff from being injured, and where there is no adequate remedy at law. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07, 79 S. Ct. 948, 954, 3 L. Ed. 2d 988 (1959). In this case, the Monitor's resolutions injured no member of a plaintiff class on account of race or in any other way. Had injury occurred in violation of any of the civil rights laws or the Equal Protection Clause of the Fourteenth Amendment,

a class member could have filed an independent lawsuit, in state or federal court, and sought legal or equitable relief, or both. But, because no class member suffered injury, plaintiffs' counsel were proceeding strictly on their own. That is, although they appeared to be representing the plaintiff classes, they were actually representing no one but themselves — bent on preventing the three white grievants from obtaining provisional appointments and back pay. They proceeded as if the white grievants had done something unlawful by invoking the race-neutral complaint procedure.

Because they had suffered no injury that would warrant relief, legal or equitable, plaintiffs' counsel lacked standing to prosecute their application for a preliminary injunction. Moreover, by using the *Reynolds* case as a vehicle to prosecute their application, they abused the judicial process. And the abuse was as gross as any we have encountered. As we detail in the margin,[21] counsel not only failed to join the

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21. After plaintiffs' counsel filed their motion for preliminary injunction to prevent the Department from implementing the EEO Monitor's resolutions, the attorneys for the Adams Intervenors moved the court to allow the three white grievants to intervene as individuals in order to represent their interests. At the March 24, 1997, hearing on plaintiffs' counsel's application for a preliminary injunction, plaintiffs' counsel objected to a separate intervention by these white grievants, stating, "Intervention is not necessary to bind these parties to an injunction. To allow further white employees to come into the case at will at this late date is not proper." The court stated it would "take the motion [to intervene] under submission. Since it appears that the movants . . . are represented by the same lawyer [as the Adams Intervenors], I don't see any need to resolve that right now."

(Cont'd)

three white grievants as defendants, they vigorously opposed their efforts to intervene.

There is no need to say more. The district court's preliminary injunction is vacated, and we instruct the court to strike from the record plaintiffs' counsel's application for injunctive relief barring the Department from implementing the EEO Monitor's resolutions of the three white employees' grievances.

B.

We address the merits of the Adams Intervenors' appeal of the declaratory judgment by making a few observations that can hardly be disputed. First, Consent Decree I provides race-neutral prospective relief, and that is all. Second, Article 19 required the Department to draft a procedure for ensuring

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The district court entered the preliminary injunction on April 9, without ruling on the motion to intervene. The Adams Intervenors filed their notice of appeal on behalf of the class and on behalf of the white grievants as "proposed-intervenors."

Two months later, the Adams Intervenors, in their brief in opposition to plaintiffs' counsel's motion for a permanent injunction, argued in support of their motion to allow the three white grievants to intervene. Neither plaintiffs' counsel nor the Department responded to the arguments.

As far as we can tell from the record, the district court has never ruled on the white grievants' motion to intervene. Under the circumstances, for purposes of this appeal we treat the three white grievants as part of the class represented by the Adams Intervenors.

that employees could complain about such things as improper job classification and pay "without fear and reprisal" and to submit the procedure to "plaintiffs' counsel for review and comment." The Department drafted a procedure, the "Revised Complaint Procedure," and submitted it to plaintiffs' counsel as Article 19 required. The draft was, as indicated *supra*, entirely neutral with respect to "race, color, creed, sex, national origin, age, or handicap," meaning that the procedure would be made available to everyone, including a non-black. Third, plaintiffs' counsel approved the draft. *See supra* n.4. Fourth, although Article 19 did not require court approval, the draft was submitted to the district court. Fifth, the court approved the draft, and thus made it an amendment to Consent Decree I.

To say that the Revised Complaint Procedure somehow "violates" Consent Decree I, as plaintiffs' counsel contended in their application for a permanent injunction (barring non-blacks from invoking it) is more than sophistic; it is preposterous. So, why did plaintiffs' counsel file their application for a permanent injunction which would limit the protection afforded by the complaint procedure to blacks only? Because they thought they had made a bad bargain, and they wanted to undo it. But, instead of asking the court to void the contract, however, for mutual mistake of fact or some other legally-recognized ground for vitiating contracts[22]

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22. Consent decrees are construed according to accepted contract principles. *See Reynolds I*, 202 F.3d at 1312-13. We note, however, that "[f]or the purposes of modification, consent decrees are not governed by contract law, but are treated as judicial acts, akin to injunctions." *Jacksonville Branch, NAACP v. Duval County Sch. Bd.*, 978 F.2d 1574, 1578 (11th Cir. 1992).

(which would have been the professional thing to do, assuming that they could satisfy Rule 11's ethical/professional standard), plaintiffs' counsel claimed that the revised procedure "violated" Consent Decree I. The district court should have given plaintiffs' claim short shrift and rejected out of hand their application for a permanent injunction. The court recognized that an application for injunctive relief is an inappropriate device for enforcing a consent decree, so it *sua sponte* transformed the application into an application for a declaratory judgment. Apparently, the court failed to realize that "that dog won't hunt," *Elrod v. Sears, Roebuck, and Co.*, 939 F.2d 1466, 1471 n.3 (11th Cir. 1991), and that it was entering a judgment that could not withstand appellate review.

It is evident, from what transpired in the district court in this case, that counsel and the court need to be reminded of two things. First, "[l]ong standing precedent evinces a strong public policy against judicial rewriting of consent decrees. '[A] district court may not impose obligations on a party that are not unambiguously mandated by the decree itself.' *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995)." *Reynolds I*, 202 F.3d at 1312. Consent decrees are contracts, and we construe them using the normal tools for interpreting contracts. *See id.* at 1312-13. Where they are unambiguous, the court must uphold a decree as written. In this case, the contract — the Revised Complaint Procedure — is unambiguous.[23] Moreover, although it was

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23. Because Consent Decree I and the Revised Complaint Procedure amendment are unambiguous, the district court erred when, in determining whether the amendment violated the decree,

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drafted by the Department's attorneys, it was approved by the plaintiff classes' highly sophisticated attorneys.[24] Accordingly, the district court had no basis in law for rewriting the contract, which it had approved, so that the Revised Complaint Procedure would be available only to blacks.

Second, if in the future a black employee — or *any* employee, for that matter — suffers racial discrimination in the work place, the employee's remedy (if the grievance cannot be resolved) will be to seek relief in a *separate* lawsuit, brought in state or federal court. If brought in the United States District Court for the Middle District of Alabama, the suit will be assigned to a district judge under the court's random assignment system. In other words, the suit will not be made a part of the *Reynolds* litigation.[25]

(Cont'd)
it considered evidence that the plaintiff classes had introduced at the trial of the case, which was aborted before plaintiffs rested, and testimony given at the March 24, 1997, hearing on plaintiffs' counsel's application for a preliminary injunction (barring the Department from implementing the EEO Monitor's resolutions of the white employees' grievances). *See Reynolds*, 996 F. Supp. at 1134-36, 1139-42.

24. We take judicial notice that plaintiffs' counsel have a wealth of experience in the courts of this circuit and are surely aware of the legal consequences of entering into contracts and consent decrees. *See, e.g., Riddle v. Cerro Wire & Cable Group, Inc.*, 902 F.2d 918 (11th Cir. 1990); *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983).

25. We issue this directive in the exercise of our supervisory power after considering the history of this litigation. *See* 28 U.S.C.
(Cont'd)

In sum, in No. 98-6192, the district court's declaratory judgment is vacated, and we instruct the district court to strike from the record plaintiffs' counsel's application for permanent injunctive relief barring the Department from making the Revised Complaint Procedure available to non-blacks.

III.

In No. 97-6347, plaintiffs' counsel invited the error the district court committed when it entered the preliminary injunction barring the Department from affording the three white grievants the provisional appointments and back pay the EEO Monitor awarded to them. In addition to inviting the error, plaintiffs' counsel have attempted to defend the district court's ruling on appeal with baseless arguments. We have considered whether we have the authority under Rule 38 of the Federal Rules of Appellate Procedure to award the Adams Intervenors "just damages and single or double costs," but we conclude that the rule, as written, precludes such an award to the appellant.[26] We have also considered

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§ 2106 (1994) ("[A] court of appellate jurisdiction may . . . require such further proceedings to be had as may be just under the circumstances."). *See generally Piambino v. Bailey*, 757 F.2d 1112, 1145-46 (11th Cir. 1985) ("Despite the wide variety of situations in which supervisory power has been invoked, the objective behind its use — fashioning procedures and remedies that ensure that the judicial process remains a fair one — has not varied."). *See also Smith v. Mulvaney*, 827 F.2d 558, 562-63 (9th Cir. 1987); *United States v. Baylin*, 696 F.2d 1030, 1043 n.30 (3d Cir. 1982).

26. Rule 38 states: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice
(Cont'd)

whether we have the authority under 28 U.S.C. § 1927 (1994) to award these intervenors "excess costs, expenses, and attorneys' fees reasonably incurred" because of counsel's conduct. The courts of appeals have section 1927 authority. *See, e.g., T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 638 (9th Cir. 1987); *Olympia Co., Inc. v. Celotex Corp.*, 771 F.2d 888, 893-94 (5th Cir. 1985). Counsel subject to section 1927 sanctions are entitled to be heard regarding the matter, *see Braley v. Campbell*, 832 F.2d 1504, 1514-15 (10th Cir. 1987) (*en banc*); accordingly, on receipt of the mandate, the chief judge of the Middle District of Alabama will assign the case to himself or another district judge (other than Judge Thompson) for the purpose of enabling plaintiffs' counsel to show cause why section 1927 sanctions should not be awarded to the Adams Intervenors.

In No. 98-6192, we conclude that the issue is a closer one. We assume that plaintiffs' counsel are not responsible for the district court's *sua sponte* decision to transform their application for a permanent injunction into an application for a declaratory judgment. As the district court itself acknowledged, it should have dismissed counsel's application for a permanent injunction under the authority of *Newman v. Alabama*, 683 F.2d at 1318.

(Cont'd)
from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." *See also* 28 U.S.C. § 1912 (1994) (allowing court of appeals to award "just damages . . . and single or double costs" when "a judgment is affirmed").

Appendix A

IV.

In conclusion, in No. 97-6347, we vacate the district court's preliminary injunction and instruct the court to strike plaintiffs' counsel's application for injunctive relief. In No. 98-6192, we vacate the court's declaratory judgment and instruct the court to strike from the record counsel's application for a permanent injunction. The court is instructed to restore the case to the *status quo ante*, which means nothing has happened in this case since August 9, 1995, when the district court entered its Order and Injunction, amending Consent Decree I to incorporate the Revised Complaint Procedure.

SO ORDERED.

Appendix A

STORY, District Judge, concurring in part and dissenting in part:

I agree with the majority's decision vacating the district court's preliminary injunction in No. 97-6347 and instructing the district court to strike Plaintiffs' application for injunctive relief and vacating the district court's declaratory judgment in No. 98-6192 and instructing the district court to strike from the record Plaintiffs' application for permanent injunctive relief. However, as to Part III of the majority opinion, I dissent.

The majority charges plaintiffs' counsel with "proceeding strictly on their own" and "representing no one but themselves" in their pursuit of an injunction to prohibit the use of the Revised Complaint Procedure by non-blacks. I do not ascribe such sinister motives to plaintiffs' counsel. We must not lose sight of the history of this case. Hopefully, we are in the final chapter of a series of suits brought to end pervasive discrimination within the Alabama Department of Transportation ("ALDOT"). It is against this background that counsel's motives should be judged. For example, evidence presented at the 1992 trial concerning the alleged pre-decree practice which allowed supervisors and employees to circumvent the merit selection process through provisional promotions reasonably raised counsels' concerns that the new procedure might be abused. Plaintiffs' counsel thus had a legitimate concern that the Revised Complaint Procedure might violate Consent Decree I. Based upon the orders it entered, the district court apparently shared these concerns.

Because there is no evidence to support a finding that the Revised Complaint Procedure was being used by ALDOT

officials to violate Consent Decree I or in an otherwise discriminatory manner, the relief granted by the district court cannot be justified. However, this historical evidence arguably justified action being taken by plaintiffs' counsel to get the issue before the district court for consideration. Except for the majority's findings about plaintiffs' counsel's motives, I **CONCUR** fully in the analysis of the majority in Parts I, II, and IV.

As to Part III, I would not impose § 1927 sanctions. Though plaintiffs' counsel sought the wrong form of relief, they were attempting to be vigilant in protecting their clients' rights rather than being unreasonable and vexatious. Therefore, as to Part III of the majority opinion, I **DISSENT**.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION DATED AND FILED MARCH 3, 1998

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

ORDER

The history of this 13-year-old lawsuit — in which African-American plaintiffs have charged defendants Alabama Department of Transportation and Alabama State Personnel Department with employment discrimination — documents a struggle to create a Transportation Department where merit is considered and evaluated in a color-blind fashion, so that opportunities are equally available to qualified candidates. A 1994 consent decree, commonly referred to as 'consent decree I,' set up an *open and*

competitive system in which persons, regardless of race, could pursue and be considered for promotions, both provisional and permanent, on the basis of merit.[1]

Currently before the court are the plaintiffs' motions for an injunction permanently prohibiting the Transportation Department from perverting its employee grievance procedure into a tool to allow supervisors again to engage in the secretive and non-competitive selection and promotion of employees. Under the challenged grievance procedure, according to the plaintiffs, a favored employee whose supervisor has selected him or her to fill an out-of-class position would file a grievance to be provisionally promoted to the new out-of-classification position and possibly receive backpay from the time of the appointment, the employee and the supervisor would then enter into a 'settlement' of the grievance, and the employee would then receive a provisional appointment, with backpay, to the position pursuant to the so-called settlement agreement. Employees whom their supervisors disfavored, for whatever reason, could not compete for the position, no matter how well qualified. The plaintiffs maintain that to allow the grievance procedure to be used in this manner would be to allow the procedure to become essentially a closed and non-competitive means for friendly promotions. Indeed, according to the plaintiffs, three white employees — Andrew Grant, Michael McCullough, and John D'Arville — have attempted, and hundreds of other employees are attempting, to have the grievance procedure used to this very end.

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1. *See Reynolds v. Alabama Dep't of Transp.*, 1994 WL 899259 (M.D. Ala. Mar. 16, 1994) (Doc. no. 553).

Appendix B

For the reasons that follow, the court finds that the use of the grievance process in this manner perpetuates practices forbidden by consent decree I and condemned in another longstanding, companion case, *United States v. Frazer*, civil action no. 2709-N (M.D. Ala.).[2] For this reason, and with the goal of creating a level playing field in the Alabama Department of Transportation always before it, the court grants the plaintiffs' motions for permanent injunction, albeit only to the extent of giving declaratory relief.[3]

I. BACKGROUND

This lawsuit, filed by African-American applicants and employees of the Alabama Department of Transportation alleging racial discrimination, is now about to begin its fourth year under consent decree I, a partial settlement between the parties designed to remedy past discriminatory policies and establish open and equal access to employment opportunities

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2. When originally filed, this case was styled *United States v. Frazer*, civil action no. 2709-N (M.D. Ala.). It is currently styled *United States v. Ballard*, civil action no. 2709-N (M.D. Ala.), because, after December 4, 1981, Halycon Vance Ballard replaced John S. Frazer as the named defendant in the case.

3. *See* plaintiffs' motions for preliminary injunctions, filed March 10, 1997 (Doc. no. 1635) (treated as a motion for permanent injunction pursuant to order entered March 11, 1997 (Doc. no. 1643)), and March 28, 1997 (Doc. no. 1716) (treated as motion for permanent injunction pursuant to order entered March 31, 1997 (Doc. no. 1726)).

Consent decree I authorizes the parties to seek relief under the *Frazer* orders in this case. *See* note 79, *infra*.

throughout the Transportation Department. Incorporated by reference into the consent decree are the findings and orders from permanent injunctions entered in an earlier discrimination lawsuit against the Transportation Department, the *Frazer* litigation. Because the histories of these two lawsuits against the Transportation Department are so interrelated, the court will begin with an overview of the relevant history of the period leading up to both the *Frazer* injunctions and the entry of consent decree I.

Frazer Litigation: For the first three-quarters of this century, the State of Alabama and its agencies excluded African-Americans, because of their race, from employment other than in low and menial positions, and throughout the last quarter of this century, despite outstanding court orders, the Transportation Department manipulated, or even circumvented, State personnel procedures to avoid hiring and promotion of African-Americans into responsible and non-menial jobs.

In the late 1960s, the United States brought an action against the Alabama State Personnel Department challenging personnel practices which it contended intentionally discriminated against African-American applicants and employees. In 1970, in *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala.), this court agreed with the United States, and found that agencies of the State of Alabama had engaged in a State-sanctioned policy of manipulating and circumventing the State's personnel procedures to avoid the hiring and promotion of African-Americans. *Id.* at 1084-87. The court found intentional, pervasive, systematic exclusion and avoidance of black employees and applicants throughout numerous State departments.

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The evidence demonstrated that racial discrimination was accomplished in several ways, many of which involved manipulations of personnel practices and procedures to exclude eligible and qualified black employees from competing for jobs. The evidence overwhelmingly showed refusals to hire, or even to interview, African-Americans who had qualified and appeared on the certificates of eligibles, despite an urgent and constant need to fill positions. *Id.* at 1087. It also showed that agencies maintained racially segregated facilities in their buildings. *Id.* Indeed, John S. Frazer, director of the Personnel Department, testified to his belief that the race of applicants was a legitimate factor for consideration in selecting employees. *Id.* at 1085.

The court found that "defendants' systematic refusal to appoint Negro applicants and their preference for lower-ranking white applicants constitute unlawful race discrimination[,] . . . a clear violation of the equal protection clause of the Fourteenth Amendment." *Id.* at 1089-90. The court entered similar findings on the defendants' recruitment and advertising practices.

The court entered an order broadly prohibiting State officials from "engaging in any employment practices, including recruitment, examination, appointment, training, promotion, retention, or any other personnel action, for the purpose or with the effect of discriminating against any employee, or actual or potential applicant for employment, on the ground of race or color." *Id.* at 1090. The court further imposed what has come to be known as the 'no-bypass rule,' which provides that State officials "shall not appoint or offer a position to a lower-ranking white applicant on a certificate

in preference to a higher-ranking available Negro applicant, unless the defendants have first contacted and interviewed the higher-ranking Negro applicant and have determined that the Negro applicant cannot perform the functions of the position, is otherwise unfit for it, or is unavailable." *Id.* at 1091.

Six years later, in the same litigation, similar allegations were again before the court. The United States charged that State personnel practices were systematically and deliberately manipulated to prevent blacks from competing with white applicants for jobs and promotions. In an order entered in August 1976, the court found a pattern and practice of racial discrimination in employment in the Transportation Department (then known as the Highway Department). *See United States v. Frazer*, civil action no. 2709-N, 1976 WL 729 (M.D. Ala. Aug. 20, 1976).

Specifically, the court found that the new defendants, including the Transportation Department, "avoided compliance with the decrees in this case by examining job registers maintained by the Personnel Department of the State of Alabama and by requesting certificates of eligibles only at times when no blacks were available for certification." *Id.* at *4. The court also pointed out other evidence of discriminatory practices, including maintaining registers on a non-continuous basis (establishing a register and not adding any persons until that register is exhausted and another exam is administered), or 'closing' a register for as long as two years. In this way, all-white registers were maintained. *Id.* at *5-*6. The court observed, "Progress toward erasing

the effects of prior exclusionary practices upon the basis of race has been minimal and in many instances non-existent." *Id.* at *6.

The court also recounted the story of one black applicant's attempts to obtain a position with the State, and the elaborate lengths to which the Personnel Department went to avoid him. This occurred despite the fact that he was first on the register for the position, and that the Alabama Development Office Assistant Director found him "extremely well qualified." *Id.* at *4-*5.

The court entered a more detailed order requiring, among other things, that defendants validate all written tests. It also ordered that State officials "shall insure that blacks who are appointed to . . . job classifications common to several agencies shall be appointed to all agencies in which such vacancies occur. No defendant shall attempt to avoid this provision by deferring requests for certification until blacks are unavailable." *Id.* at *7. One of the injunction's specific provisions required that the defendants "engage in intensive recruitment for black applicants for . . . Graduate Civil Engineer." *Id.*

Reynolds Litigation: This lawsuit was initiated in May 1985. The plaintiffs charged that the defendants discriminated against them in employment because they are African-Americans, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 1981a, 2000e through 2000e-17, the fourteenth amendment to the United States Constitution, as enforced by 42 U.S.C.A. § 1983, and 42 U.S.C.A. § 1981. The plaintiffs represent a class of

African-American merit and non-merit system employees and unsuccessful applicants. The defendants include the Alabama Department of Transportation, the Alabama State Personnel Department, and several State officials. The jurisdiction of the court has been invoked pursuant to 28 U.S.C.A. § 1343 and 42 U.S.C.A. § 2000e-5(f)(3). The plaintiffs charged, among other things, that, despite the orders entered in *Frazer*, the Transportation and Personnel Departments continued to manipulate and circumvent State personnel procedures so as to avoid hiring and promoting blacks. Upon appropriate motion, the court consolidated the *Frazer* lawsuit with the *Reynolds* case.[4]

After some discovery, the parties reached a full settlement of this case in 1988, but the court refused to approve the proposed consent decree in the face of numerous objections from the members of the plaintiff class. *See Reynolds v. King*, 790 F. Supp. 1101 (M.D. Ala. 1990). Litigation then resumed.

A trial was held in 1992 that extended over several months. The evidence presented reflected that, during the years following the court's 1976 findings in *Frazer*, defendants continued to engage in the same pattern and practice of racial discrimination. By use of these practices, the evidence reflected, the defendants could preclude black applicants from applying for the historically white job classifications for prolonged periods, extending such exclusion into the late 1980s for some larger and more important job classifications. The most obvious of these practices, condemned and enjoined in 1976, was the refusal

4. *See* order, entered July 31, 1992 (Doc. no. 434).

to permit applications for years at a time while the existing register used to fill vacancies was either all-white or predominantly white. In the 1980s, when African-Americans began to apply for positions where registers had been exhausted, applicants were suddenly subjected to a battery of new screening criteria and examinations. No evidence established that these criteria were job-related, nor validated as required by the *Frazer* injunction.

For example, the first qualification imposed on applicants for the Graduate Civil Engineer positions, an entry level job, was that they graduate from an 'accredited' program, which eliminated graduates from most predominantly black schools. In mid-1979, however, a graduate of Southern University's accredited Civil Engineering program learned of a Graduate Civil Engineer job at the Transportation Department and attempted to apply for it. Josh Chapple testified at trial, and the Department's internal documents corroborated his testimony, that, instead of processing Chapple's application in the normal fashion according to the established criteria and procedures, both the Transportation Department and the Personnel Department subjected him to a series of delays and special requirements. Among them were: (1) a requirement that he pass the 'engineer-in-training,' also known as the 'EIT,' examination, though the defendants did not require that of white applicants; (2) a requirement that he take additional college course work in geology and transportation science before they would accept his application, though they did not post such course work on the job announcement or require it of white applicants; and (3) various other roadblocks catalogued on a daily basis in a Transportation Department internal

memorandum dated November 3, 1978.[5] In another, later in-house memorandum, dated March 16, 1984, the Transportation Department's minority recruiter wrote: "[A] door to potential black [Graduate Civil Engineer]'s from predominantly black Southern University was slammed when, on November, 1978, the qualifications which had been sufficient for many years for white [Graduate Civil Engineer]'s were found to be unsatisfactory" for the first black applicants who satisfied them.[6]

Finally, when two African-American applicants on the register were to be hired because of the no-bypass rule of *Frazer*, and ten more African-American graduates appeared on the Graduate Civil Engineer employment register, the defendants suddenly abolished the register. The new job announcement included the EIT test as a posted requirement. The defendants, in an unabashed echo of their earlier racially discriminatory treatment of Chapple, declared the ten African-American applicants ineligible to reapply, despite their having successfully competed and ranking high enough on the register to be selected and despite the affirmative duty placed on the defendants by the *Frazer* injunction to "engage in intensive recruitment for black applicants for . . . Graduate Civil Engineer."[7] *Frazer*, 1976 WL 729, at *7.

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5. Plaintiffs' supplemental memorandum in support of the goals of proposed consent decree, filed March 7, 1994 (Doc. no. 538), appendix A.

6. *Id.*

7. This event was described in the March 16, 1984, memorandum as follows: "Perhaps the most indigestible example

(Cont'd)

Appendix B

Chapple's story is one of the most compelling. But there was testimony from other witnesses of numerous other instances of racially discriminatory employment practice — far too many instances to recount here. One example, however, was plaintiff class member Ganiu Alabi.[8] Alabi testified that in spite of his qualifications, which included college degrees in petroleum and civil engineering, passing the EIT exam, and teaching labs for college engineering courses, his applications with the Transportation Department for civil engineering jobs were repeatedly denied. Instead, he was hired as an Engineering Assistant I, a position which requires only a high school diploma, in a geographic area more than 150 miles from his home. Neither his supervisor, his supervisor's supervisor, nor his supervisor's supervisor's supervisor had a college degree in engineering. In addition, Alabi rode in a Transportation Department truck from Fort Deposit, Alabama, to his work site with his supervisor throughout the year of his employment. His supervisor refused to permit him to ride in the cab of the truck, though it was not occupied. From the driver's seat, the supervisor would spit tobacco juice out the window, striking Alabi in the face. Alabi described the insulting incident as follows:

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of practices which negatively affect minority employment is the one in which the [Graduate Civil Engineer] register which included ten minorities was abolished on March 30, 1983 by the apparently arbitrary inclusion of the requirement that the EIT examination be passed." *Id.*

8. *See* transcript of third day of trial, held June 17, 1992, at 3-56.

"[MR. ALABI]: . . . [The supervisor] chews tobacco and makes sure to spit it out while the truck was in motion. I ended up with most of the juice in my face.

"[PLAINTIFFS' COUNSEL]: Did you complain about that?

"MR. ALABI: Yes, I did.

"[PLAINTIFFS' COUNSEL]: Yes, you did?

"MR. ALABI: He told me, 'tough shit, it was a privilege to ride in the truck, not a right.' "[9]

In addition to these insulting behaviors, Alabi's supervisor also expressed his opinions that blacks with engineering degrees were inferior to whites with similar qualifications, and that blacks were lazy and sat around watching television and collecting welfare. Finally, despite Alabi's continuing attempts to be considered for engineering jobs better suited to his qualifications, and despite a transfer to another area, he had not, at the time of the 1992 trial, been considered for an entry level engineering job. He was not even promoted to an Engineering Assistant-II. He left the Transportation Department for a engineering job with the Alabama Department of Natural Resources.

Other evidence established that the Transportation Department had posted no job announcements, nor received

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9. *Id.* at 20-21.

applications in certain job categories, for as long as seven years, far longer than the two years that the court condemned as discriminatory in *Frazer*. For example, the defendants refused to receive applications for Civil Engineer-I and -II positions from 1974 to 1987, except for one three-week period in 1979 and a second three-week period in 1984. The defendants still did not take Civil Engineer-II applications up to the entry of consent decree I — opening that classification for only nine weeks in 20 years. Similar statistics were presented for many other job classifications. Evidence also showed maintenance of multiple registers, which supervisors could preview before determining from which to fill a job and which they could then use to manipulate the selection process so as assure the selection of persons whom the supervisors wanted, despite the relative qualifications of those under consideration and despite any roadblock the no-bypass rule might have place in the selection process.[10] The 1976 *Frazer* injunction specifically condemned previewing registers. *Frazer*, 1976 WL 729, at *4.

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10. Multiple registers were formed simultaneously for certain job classifications with applicants being eligible for each register on the basis of different entrance requirements. The types of registers formed simultaneously for a single job classification included: (a) open-competitive registers; (b) promotional registers; and (c) reemployment registers. Applicants are determined to be eligible for each of these types of registers on the basis of different criteria. Applicants eligible for both an open-competitive and a promotional register would be ranked on both, but their scores and ranks on each register could, and often would, be different because the scoring procedures differ from one register type to another and the number and identity of persons on each type register are different. An applicant who is ineligible for one type of register could be eligible for the other type.

Appendix B

The trial ended before completion when the parties announced that they might be able to settle the litigation again. In 1993, the parties reached a second, albeit only partial, settlement. In the wake of this new partial settlement, the court allowed a group of non-class members — consisting mostly of white employees of the Department of Transportation and now commonly referred to as the 'Adams intervenors' — to intervene and challenge any race-conscious provisions in the settlement. *See Reynolds v. Roberts*, 846 F. Supp. 948 (M.D. Ala. 1994).

The new partial settlement was submitted to the court for approval in 1994. One part of the settlement was approved by the court and incorporated into consent decree I. The court has reserved ruling on other parts of the settlement. Consent decree I required that the Transportation and Personnel Departments establish, in a timely manner, new, non-discriminatory personnel procedures that would allow African-Americans and all other employees to compete for positions, openly and fairly, without regard to race. The decree provides detailed requirements regarding, among other things, recruitment (article I), training (article XVI), and the establishment of open and fair hiring and promotion procedures (articles II, III, IV, VI, VII, VIII, IX, X, and XIV). These requirements would, among other things, significantly restrict any opportunity for the Transportation Department to manipulate and circumvent personnel procedures in the future so as to avoid the hiring and promotion of African-Americans. Because time was of the essence — it was important not only to abolish immediately the Transportation Department's discriminatory procedures but also to establish new non-discriminatory ones with some urgency — the

decree set time limits for compliance. In other words, the Transportation and Personnel Departments were required, within a certain period of time, to redress the past effects of their racially discriminatory policies and practices *and* to create and implement a personnel system that would be fair and open and that would restrict the two departments' opportunities to continue to discriminate against African-Americans.

Plaintiffs' Motions for Permanent Injunction: The issue of the possible abuse of the Transportation Department's grievance procedure through so-called private settlements between employees and supervisors — in which employees would gain provisional appointments, with backpay, pursuant to these settlements and outside the competitive promotion process — was first brought to the court's attention, not by the plaintiffs, but rather by the defendants, through a motion filed on January 14, 1997, to enjoin these grievances and for protective order.[11] The court entered an order on January 22, 1997, denying the motion and stating that it had no role at that stage in the revised grievance procedure, and, as to the protective order, that the matter was premature.[12]

However, upon imminent implementation of the remedies offered to three grievants — Andrew Grant, Michael McCullough, and John D'Arville — the plaintiffs filed a motion for a temporary restraining order, alleging those personnel actions pursuant to settlement agreements

11. Doc. no. 1477.

12. Doc. no. 1498.

in the Grant, McCullough, and D'Arville grievances would violate the decree and other court orders.[13] The settlement relief offered to the grievants included retroactive provisional appointment to a promotional position and backpay. By orders entered on February 27 and March 11, 1997, the court granted the motion.[14]

On March 10 and 31, 1997, the plaintiffs filed additional motions for temporary restraining order and preliminary injunction requesting that the court enjoin any grievances settled in step one of the grievance process simply by agreement between a supervisor and a grievant.[15] They argued that vesting the authority to grant appointments and backpay in supervisors creates the opportunity for circumvention of the merit system and the consent decree, and allowed for the exchange of favors among supervisors. The court treated these additional motions as ones for permanent injunctions and set them for final hearing.[16] In the meantime, on April 9, 1997, the court entered a preliminary injunction essentially extending the temporary order.[17]

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13. *See* motion for temporary restraining order, filed February 26, 1997 (Doc. no. 1585).

14. *See* Doc. nos. 1587 and 1644.

15. *See* motion for preliminary injunction, filed March 10, 1997 (Doc. no. 1635), and motion for temporary restraining order and/or preliminary injunction, filed March 28, 1997 (Doc. no. 1716).

16. *See* orders entered March 11, 1997 (Doc. no. 1643), and March 31, 1997 (Doc. no. 1726).

17. *See* order and preliminary injunction, filed April 9, 1997 (Doc. no. 1760).

Appendix B

The plaintiffs initially framed this issue as a challenge to the application of the grievance process in three individual cases, and the conflict created between the grievance process and certain provisions of consent decree I and orders enforcing the decree. During the initial four-day hearing and a three-day supplemental hearing, the evidence presented compellingly proved the significance of this matter to broader issues in this lawsuit beyond the structure of the grievance procedure, implicating the most basic and critical underpinnings of the decree.

The Adams intervenors, who support the continued use of the grievance process in this manner, maintain that the basis for settlements offered to these grievants by their supervisors is the assignment to 'out-of-classification' positions, which the grievants contend violates article XV, ¶ 4, of consent decree I. Paragraph 4 states:

> "Duties within the job description: The Highway Department will monitor the duties and responsibilities performed by employees with the goal of assuring to the extent practicable that at least 90% of the duties and responsibilities performed by employees on a regular or non-emergency basis are within the job description for job they are holding."

This 90% requirement, according to the Adams intervenors, requires that these grievants be provisionally appointed to the positions they hold out-of-class. They submit that black grievants were awarded similar relief on those grounds, and that they are entitled to the same treatment. The plaintiffs

contend that the grievances by the black employees were not based on violations of ¶ 4 of article XV, but on findings of racial discrimination and wrongful denial of positions for which the black employees had competed.

The defendants join the plaintiffs in contending that complaints about out-of-classification assignments should not be resolved through the grievance process, and thus the defendants agree, in the words of defense counsel, that the court should "stop the [grievance] procedure for everyone right here, both black and white."[18] The defendants acknowledge that should these grievances be found valid, there is the potential for hundreds of grievances by both black and white employees on the same basis — that is, working in out-of-classification positions. They disagree with the plaintiffs, however, on any other limitation on the availability of the grievance process. Finally, the defendants propose that the article XV reclassification project, rather than the grievance procedure, be used to adjust permanently the classification of approximately 400 employees working out-of-classification.

The plaintiffs respond that reclassification, as the defendants and Adams intervenors would apply it, is equally violative of consent decree I. The core of the problem, as the plaintiffs present it, is the initial 'assignment' of out-of-classification positions, a process that, the plaintiffs claim, circumvents and violates specific decree provisions, as well as its intent and purpose. The plaintiffs argue that to assign

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18. Transcript of first day of hearing on plaintiffs' motion for permanent injunction, held March 24, 1997, at 33.

duties and responsibilities and then award promotions, even provisional promotions, or reclassifications, on the basis on those assignments, rather than opening the positions for a competitive selection process, defeats a primary goal of the consent decree: to eliminate past practices which prevented fair competition between qualified employees.

II. DISCUSSION

A.

The plaintiffs argue that the provisional appointments of Grant, McCullough, D'Arville, and potentially hundreds of others, pursuant to private, closed, and essentially friendly grievance settlements, either violate, or stem from violations of, article I (recruitment), article IV (provisional appointments), article XI (proportional assignments), article XIV (rotation of job duties), article XV (reclassification), and article XVI (training). Most significant, they argue, is that these violations, in sum, destroy perhaps the most fundamental purpose of the decree, as expressed by article XIX, ¶ 6(d):

> "It is the intent and purpose of this Decree to undo the effects of the past practices which have been the subject of this case and Decree and to prevent further practices which may perpetuate such eff[ects] or otherwise discriminate against the plaintiffs or the class they represent. To the extent that this Decree fails to achieve the intent and purpose for which it has been entered, the parties may seek further relief from the Court."

As to whether out-of-class appointments or reclassifications violate this quoted provision, perhaps the most compelling testimony was that of Don Arkle, the Alabama Department of Transportation Design Bureau Chief, who is white. Arkle testified that one of the best features of the consent decree is its insurance against the pre-decree practices which allowed supervisors and employees to circumvent the merit selection process then in place, and to promote employees based on personal bias or other non-merit criteria. Testimony presented to the court during the 1992 trial — for example, that of Ganiu Alabi recounted above — which led to the entry of the consent decree, strongly suggested that one criterion often used by supervisors and employees in this hidden and biased manner, was race. The exchange in open court with Arkle was as follows:

> "[PLAINTIFFS' COUNSEL]: And you testified that you're knowledgeable that the Decree was intended to end the practice of circumventing the Certificate of Eligibles in the register process, correct?
>
> "MR. ARKLE: Yes.
>
> "[PLAINTIFFS' COUNSEL]: And you personally think that's one of the best features of the Consent Decree, that it ends that practice.
>
> "MR. ARKLE: Yes, sir, I do."[19]

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19. *Id.* at 99.

Arkle then acknowledged that the use of the grievance procedure, as Grant, D'Arville, and McCullough would cast it, would essentially again allow supervisors and employees to circumvent the open merit-selection process, and would reintroduce the condemned non-competitive, secretive, handpicking process, albeit as a one-time event.

> "[PLAINTIFFS' COUNSEL]: But now these grievances and this whole out of classification reclassification effort is going to reinstall it, isn't it?
>
> . . .
>
> "THE COURT: Let me ask this: How will it be different?
>
> "MR. ARKLE: Well, the one time it made everybody in the proper classification they're working in.
>
> . . .
>
> "THE COURT: Other than the fact this occur[s] at one time rather than repeated occurrences, do you know of any other difference between what's being proposed here with the grievance and what was going on before in the Consent Decree?
>
> "MR. ARKLE: I'm not sure I understand the question.

> "THE COURT: Well, your answer to my question was that it was a one time occurrence. And, I'm asking, is that the only distinguishing characteristic?
>
> "MR. ARKLE: I guess so."[20]

In other words, as previously stated, a favored employee whose supervisor has selected him or her to fill an out-of-class position, would need only to file a grievance to be provisionally promoted to the new out-of-classification position and possibly receive backpay from the time of the appointment. For, the employee and the supervisor could then enter into a 'settlement' of the grievance, and the employee could then receive a provisional appointment, with backpay, to the position pursuant to the so-called settlement agreement. Employees whom their supervisors disfavored, for whatever reason, could then never compete for such a position, no matter how well qualified they are.

The consent decree set up an *open and competitive* system in which persons, regardless of race, could pursue and be considered for promotions, both provisional and permanent, on the basis of merit. The following provisions, which the plaintiffs claim are violated by the award of out-of-class assignments, were crafted largely to accomplish that end.

B.

Article I: The detailed recruitment provisions of article I are extensive, and their broad scope suggests that the parties took these provisions quite seriously as a remedy to their

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20. *Id.* at 99-102.

dispute. It is self-evident that article I's goal is to identify and encourage qualified African-American candidates, including current employees, to *compete* for jobs within the Alabama Department of Transportation. The plaintiffs contend that, by placing employees in out-of-class vacancies, defendants violate article I provisions, a violation then compounded by awarding a provisional appointment to the position pursuant to private grievance settlements — also without any recruitment — on the grounds of that out-of-class assignment.

Arkle, the Design Bureau Chief, testified that he understood article I recruitment to apply both to the filling of 'classifications' — that is, the formal installation to a job class, such as Civil Engineer-I — and 'positions' — specific jobs or in-house job titles within the Transportation Department.

> "THE COURT: Well, what does article I, according to you, apply to in particular? I'm having some difficulty seeing that. It says 'recruitment addressed to current employees reporting, regarding career paths,' is that classifications or positions?
>
> "MR. ARKLE: No, that's classifications and positions.
>
> . . .

> "THE COURT: Let me put it very bluntly to you. Do you see your duty as to recruit, as that term is defined in article I, people for positions and classifications?
>
> "MR. ARKLE: Yes, sir."[21]

Likewise, the court has held that the recruitment provisions apply to any selection process for a job covered by article I, "regardless as to whether selection is permanent, provisional, temporary, or whatever."[22] The injunction imposed by that order applies the same requirement to a selection for a 'position' as well as for a 'job' covered by article I.[23]

Arkle also confirmed that defendants had not recruited for the positions occupied by Grant, McCullough, and D'Arville, a matter about which there seems to be no dispute.

> "[PLAINTIFFS' COUNSEL]: Now, you have not given any encouragement, assistance, or even notification to the black employees of these opportunities that Grant, D'Arville and McCullough have been filling, have you?
>
> "MR. ARKLE: No, sir."[24]

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21. *Id.* at 90, 92-93.

22. Order and injunction, entered July 11, 1996 (Doc. no. 1131), at 3.

23. *Id.* at 5.

24. Transcript of first day of hearing plaintiffs' motion for permanent injunction, held March 24, 1997, at 93.

Appendix B

The defendants argue that at least two of the three original grievants were assigned their out-of-class duties before the entry of consent decree I. However, the Transportation Department was then under the *Frazer* injunctions, which similarly required recruitment for positions, prohibited avoidance of black applicants, and imposed its 'no bypass' rule to prevent avoidance of black eligibles.[25]

Article IV: Paragraph 3 of article IV suspended the use of registers for certain job classifications pending the validation and development of new minimum qualifications for those classes. In the meantime, ¶ 2(b) of article II provides that:

> "Appointments in the interim between the effective date of this Decree and the completion of the requirements of this Article [Two] shall be governed by the provisions of Article Four of this Decree entitled Implementation of Personnel Projects."

Paragraph 3 of article IV further states that "vacancies in the SPD project classes . . . may be filled by provisional appointments." In its order of September 18, 1995, the court adopted the Transportation Department's proposal for provisionally filling positions.[26] That order stated in part:

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25. As noted earlier, the court enjoined the Transportation Department from appointing a lower-ranked white applicant to a position for which there was a higher-ranked black applicant on the Certificate of Eligibles. This became known as the "no-bypass rule." *Frazer*, 317 F. Supp. at 1091.

26. Doc. no. 753.

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> "(e) Qualifications for a position will not include experience in the job applied for where the duties of the position in question have been performed by one or more applicants or candidates for the position while in a lower classification, unless the opportunity to perform such duties has been rotated or provided on a proportionately equal basis to black and white employees in the same lower classified job(s), and was otherwise consistent with and in compliance with Consent Decree I."

Under this provision, any competitive advantage gained by an out-of-class assignment that in any way violates consent decree I, or is not proportionally available, would be eliminated. Significantly, the prohibition draws no distinction between pre- and post-decree out-of-class experience. Such a statement can only reflect an attempt to prevent out-of-classification appointments from blocking the replacement of the former system of patronage with an open and competitive process.

These provisions of the decree and orders of the court are confounded by a procedure whereby a selective, non-competitive awarding of positions, through the assignment of out-of-classification duties, can then convert to a provisional appointment with the mere filing and settlement of a grievance.

The awarding of provisional appointments to Grant, McCullough, D'Arville, and others does not involve or take into consideration the September 15, 1995, order. That is,

grievants would receive these provisional appointments on the basis of their assignment of out-of-class duties without any assessment of whether they were both proportionally available to class members *and* assigned in a manner consistent with all the provisions of consent decree I and, by incorporation, the *Frazer* injunctions.

Article XIV: Another provision of the consent decree also addresses the prohibition on using out-of-classification assignments to circumvent the open and competitive nature of the system imposed by the decree. Paragraphs 2 and 3 of article XIV state:

> "2. Assignment of duties:
>
> "(a) To the extent practicable, the duties and responsibilities of higher classified jobs will be assigned on a proportionately equal basis to black employees compared with white employees in the same lower classified jobs.
>
> "(b) The Highway Department will to the extent practicable not assign duties in such a way that any employee will gain an advantage in promotions, including reclassification, over other employees in the same classification.
>
> "3. Job duties which better prepare employees:
>
> "(a) Within 90 days following the effective date of this Settlement Decree, the Highway Department and the Personnel Department will

> identify the job assignments or duties within a job classification which would better prepare an employee for examination or promotion (including reclassification) than other assignments or duties within such classification.
>
> "(b) The assignments and duties identified will include, but not be limited to, any assignment or duty which would receive a greater value or number of points in a T & E rating, a classification or pay review, or in selection from a [Certificate of Eligibles].
>
> (c) For each assignment or duty so identified, the Highway Department will, to the extent practicable, develop a means for assuring that employees on the job are periodically rotated into such assignments and duties and that black employees are assigned to such duties and assignments at rates proportional to their representation in the job classification."[27]

It is incontrovertible that should the Grant, McCullough, and D'Arville promotional appointments be allowed, the grievants "will gain an advantage in promotions" through the assignment of duties, in direct violation of article XIV, ¶ 2(b). Mr. Arkle confirmed that this would be the case.

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27. Transcript of second day of hearing on plaintiffs' motion for permanent injunction, held March 25, 1997, at 242-43.

"[PLAINTIFFS' COUNSEL]: Now, all of these persons that you have put in these out-of-classification assignments are gaining advantage over other people in their same classification by being given the proposed reclassification, aren't they?

"MR. ARKLE: Yes, sir, but to the extent practicable, we didn't have any other option. Since we couldn't make provisional appointments, I had positions that I had to assign the duties to someone. So to the extent practical, I had to make those assignments.

"[PLAINTIFFS' COUNSEL]: But the only person that prevented you from making a provisional appointment was your own Director of the Transportation Department. He just wouldn't let you, would he?

"MR. ARKLE: I don't know the reasons at every point in time why we couldn't make provisional appointments."

As shown by this testimony, the defendants respond that they have had no choice but to work employees out of class, but they offer little evidence in that regard. Nor do they address the violation of article XIV, ¶ 2, in their briefs on these motions. On the contrary, the testimony of Mr. Arkle supports the plaintiffs' stance that these positions could have been opened for provisional appointments but for the Transportation Department's unexplained decision not to do

so. Mr. Arkle testified that in 1996 he had requested to fill a vacancy in his area created by retirement, but when the request was denied, he simply selected an employee and placed him in the position.

> "[PLAINTIFFS' COUNSEL]: . . . When you made Mr. [Steve] Walker Assistant Bureau Chief on April 11th, 1996, you specifically asked Ray Bass to be allowed to fill that position through the competitive selection process called for provisional appointments, didn't you?
>
> "MR. ARKLE: Yes, sir.
>
> "[PLAINTIFFS' COUNSEL]: And he said "no," didn't he?
>
> "MR. ARKLE: Yes, sir.
>
> "[PLAINTIFFS' COUNSEL]: Thereby, you're saying forcing you to put him out of class, correct?
>
> "MR. ARKLE: Yes, sir. But as I testified, I don't know the reason why we couldn't at that time do a provisional appointment."[28]

In light of the court's order of September 18, 1995,[29] adopting the Transportation Department's suggestion that all interim

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28. *Id.* at 243-44.

29. Doc. no. 753.

vacancies in the SPD project classes were to be filled through the open and competitive provisional appointment process, the court is equally unaware why such requests were denied.

Article XI: The plaintiffs also contend that the placement of employees in out-of-class assignments, rather than filling them through provisional appointments or rotating the temporary assignment, is a violation of article XI, ¶ 11. Paragraph 11 states:

> "The Highway Department will take affirmative steps to have eligible black employees of the Department receive assignments at rates proportional to their representation in the relevant job classifications to the better in-house job titles at the Highway Department. In the event that the plaintiffs conclude that the efforts of the Highway Department in this area are not adequate, they may petition the Court for further relief in this area during the pendency of this Decree."

At trial in 1992, the plaintiffs presented statistical evidence to support their position that class members were being excluded from the higher ranks in the Alabama Department of Transportation despite the *Frazer* injunctions entered in 1976, some 16 years earlier. For example, in the Civil Engineering ranks, black employees made up less than one-half of 1% (or 3 of 591) of all Civil Engineers. There were no blacks among the two Civil Engineer-VIIs, 19 Civil Engineer-VIs, 16 Civil Engineer-Vs, 89 Civil Engineer-IVs, or 119 Civil Engineer-IIIs. There was one black Civil Engineer-II of 131, and two blacks among 215 Civil

Engineer-Is.[30] Article XI, ¶ 11, among others, was included to remedy the exclusion of blacks from upper level and supervisory positions. The plaintiffs contend that the defendants' failure to comply with this provision has perpetuated the discriminatory effects of constitutional violations and extended the opportunities for supervisors to hand select employees for promotion. The grievance process, as advocated, will allow those same supervisors to resolve grievances by granting promotions, and thus avoiding application of article XI's requirement of granting equal on- the-job opportunities to black employees. Special masters in the Hudson Hinton and David Lee Sims grievances found a failure even to attempt to comply with this provision.[31]

The defendants offer no argument in reply. In fact, in the joint omnibus report filed with the court onSeptember 30, 1996, the defendants did not even respond to the plaintiffs contention that there had been no efforts to comply with article XI, ¶ 11.[32]

Article XV: On June 16, 1997, the court entered an order finding that the appropriate date of analysis for the reclassification project under article XV was the time of entry

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30. *See* transcript of third day of hearing on plaintiffs' motion for permanent injunction, held March 26, 1997, at 632-33.

31. Recommendation of the special master, entered August 22, 1996 (Doc. no. 1200), at 18, and recommendation of the special master, entered December 10, 1996 (Doc. no. 1427), at 4.

32. *See* joint omnibus report, filed September 30, 1996 (Doc. no. 1251), at 98.

of consent decree I — early 1994.[33] That finding, and its explanation, laid to rest many of the reclassification issues raised at the hearings on these motions. However, the court did not directly address the defendants' argument that the implementation of article XV, in the 'permanent' manner advocated by the defendants, be used to resolve grievances of the sort challenged here. Obviously, this argument now only applies to those employees who were working out of classification at the time of the decree, not those who have acquired positions since, a result which may alter the defendants' position on reclassification as a remedy.

Compliance with this article in its entirety has been referred to a United States Magistrate Judge, and his recommendation is due by no later than April 10, 1998.[34] Thus, the interpretation of these provisions awaits his recommendation. In the interim, the court observes that the resolution of the proper date for reclassification does not remove the two concerns raised by the plaintiffs: first, that implementation of the reclassification as proposed by the intervenors and defendants would circumvent many of the same provisions of the consent decree as would the use of the grievance procedure; and, second, that the reclassification would perpetuate past discrimination, in violation of the *Frazer* orders and consent decree I, article XIX. For those reasons, the court finds that the defendants' alternative proposal of awarding these grievants, and others similarly

33. Doc. no. 1931. A memorandum opinion in support of the order followed on June 19, 1997 (Doc. no. 1941).

34. *See* order, entered February 27, 1998 (Doc. no. 2464).

situated, permanent promotions through reclassifications rather than grievance settlements, simply does not address the essence of the conflict between the granting of promotions based on out-of-classification assignments and the cited provisions of the consent decree.

The defendants again respond that they have complied with article XV, ¶ 4's 90% requirement to the degree "practicable." On that subject, as with article XIV, testimony supported the position there was only a self-imposed impediment to opening a competitive provisional appointment process for these vacancies, which were then filled with out-of-classification personnel. Newal Cauthen, Division Engineer for the Fourth Division stated:

> "[PLAINTIFFS' COUNSEL]: And when you were asked the question about it not being practicable to keep people in their proper classification ninety percent of the time and thereby comply with article 15, paragraph 4, did you answer that question in the context of the denial of your request for provisional appointments?
>
> "MR. CAUTHEN: I don't know if I understand your question.
>
> "[PLAINTIFFS' COUNSEL]: If they were to stop denying your request for provisional appointments in the Central Office, would you be able to keep employees ninety percent of the time in their proper classification?

"MR. CAUTHEN: That is correct.

"[PLAINTIFFS' COUNSEL]: You would, correct?

"MR. CAUTHEN: Correct."[35]

Article XVI: In furtherance of the polestar goal — creating a fair and competitive environment — the parties included in consent decree I an article which focused on training. Included in article XVI are programs and policies designed to remedy the denial of training opportunities to class members in the past. In particular, ¶ 1 has a subsection which provides for a program "with the goal of assisting such employees in progressing in career paths." Referring to the training provisions, the court has said:

> "[T]his goal is to be met through *substantive* and *aggressive* training of individual African-American employees in *knowledge, skills and abilities* needed because the department discriminatorily kept them in lower and less desirable classifications and lines of progression and because, as a result, they now lack necessary on-the-job training and experience."[36]

The court has stated that it finds article XVI obligations are "at the heart of consent decree I."[37] Numerous orders,

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35. Transcript of first day of supplemental hearing on plaintiffs' motion for permanent injunction, held April 22, 1997, at 129.

36. Order, entered January 21, 1997 (Doc. no. 1491).

37. *Id.* at 17.

injunctions and warnings regarding compliance with this article have been entered by the court,[38] the compliance of which is now before the court on the recommendation of a United States Magistrate Judge for enforcement.[39]

The plaintiffs contend that the provisional installation of grievants into promotions intensifies the effects of the defendants' failure to comply with their training obligations. That is, in the absence of training, the award of out-of-classification assignments based on knowledge, skills, and abilities acquired by training given to select employees, but denied to others, perpetuates past discriminatory practices. To then award promotions on that basis reinstalls the earlier practice of tutelage of favored employees, rather than an equal opportunity to develop skills valuable in a competitive system. By permitting the installation of favored employees into these opportunities, the critical purposes of article XVI are thwarted.

C.

The defendants and the Adams intervenors further contend that the court's rulings in the grievances of Hudson Hinton and David Lee Sims, two plaintiff class members, compel the conclusion that, under article XV, ¶ 4, employees working out of class more than 10% of the time are entitled

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38. *See id.* for a detailed discussion of history of article XVI compliance.

39. Recommendation of the magistrate judge, entered October 1, 1997 (Doc. no. 2140), and supplemental recommendation of the magistrate judge, entered October 27, 1997 (Doc. no. 2204).

to the provisional appointments under the grievance procedure. The defendants' and the Adams intervenors' reliance on these two grievances is misplaced.[40]

Hinton Grievance: In a recommendation filed August 22, 1996, a special master appointed by the court found Hudson Hinton to be deserving of a provisional

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40. Paragraph 7 of article XIX of consent decree I provides:

> "Complaint procedure: Within 180 days of the effective date of this Decree, the Highway Department will develop and implement an enhanced complaint procedure which assures that all discrimination complaints are processed without fear and reprisal within established time limits and that appropriate action is taken following decisions. Such procedure will be submitted to plaintiffs' counsel for review and comment at least 30 days prior to its implementation."

Pursuant to this provision, the parties adopted, without court approval, a grievance procedure that allowed a dissatisfied grievant to pursue relief directly before this court. Upon learning of the procedure, the court informed that parties that it was not a 'super personnel board,' and that the parties would have to revise the procedure to remove the court from the process, and that a dissatisfied grievant would simply have to file a new and separate lawsuit if he wanted court review of his grievance. The grievance procedure was so amended. *See* order entered August 9, 1995 (Doc. no. 707) (adopting revised grievance procedure, filed August 9, 1995 (Doc. no. 706)). The Hinton and Sims grievance were heard under the old procedure, and thus their claims were ultimately presented to the court for review. The court appointed special masters to hear the grievances filed by Hinton, Sims, and others under the old procedure. *See* order entered July 5, 1995 (Doc. no. 666).

appointment.[41] The court adopted that recommendation, along with her findings of fact, on October 18, 1996.[42] The

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41. *See* recommendation of the special master, entered August 22, 1996 (Doc. no. 1200).

42. *See* order and injunction, entered October 18, 1996 (Doc. no. 1299). The special master recommended that Hinton be 'reclassified,' but the court ordered that he be 'provisionally appointed.' Contrary to the defendants' representation that the 'court' made such a determination, the adjustment was made by the agreement of the parties that the use of the term 'reclassification' was in error. The discussion began with an observation that any relief granted Hinton should be provisional, not permanent, since that was what he was denied, and proceeded to agreement that 'provisional appointment' was the proper term.

> "[ADAMS INTERVENORS' COUNSEL]: . . . [T]he reason for my comment on that is the complaint here was that he did not get a provisional reclassification like everyone else was getting, so it would be my suggestion that any order of reclassification be to a provisional reclassification, which is all he was denied by the Department under his grievance.
>
> "THE COURT: Okay. Let's take that up, Mr. Wiggins, that the appropriate relief, if any, should be a provisional reclassification. What's your response?
>
> "[PLAINTIFFS' COUNSEL]: Well, I'm in agreement, with one nuance, and that is what the special master found was that he was not provisionally appointed in April of 1994. . . . So, it's not a reclassification issue, it's a provisional appointment issue.
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> . . .

(Cont'd)

special master entered findings of violations of numerous provisions of the consent decree, including all of those implicated in this matter. She did, as the defendants contend, find a violation of article XV, ¶ 4. However, the basis of her recommendations was a finding of racial discrimination, in violation of article IX. She stated:

> "The Special Master is further convinced that the provisional appointment process was used to avoid giving black employees, such as Hudson Hinton, a fair opportunity to advance in the department and to reward white employees and provide them with greater job opportunities, in violation of article IX, ¶ 6 of the decree, which explicitly prohibits the use of provisional appointments to 'avoid black eligibles or the other provisions of the th[e] Decree.' As a result of these violations, Hinton was prevented from receiving an appointment to CE II, a position for which he was qualified and for which he had been recommended."[43]

(Cont'd)

> "[DEFENDANTS' COUNSEL]: I agree with Bob about that, Judge. If that recommendation was accepted, the appropriate thing would be a provisional appointment.
>
> "THE COURT: Provisional appointment. Okay."

Transcript of telephone conference, October 11, 1996, at 5-6.

43. Recommendation of the special master, entered August 22, 1996 (Doc. no. 1200), at 34.

Appendix B

Grievant McCullough was one of the white employee comparators who received a provisional appointment at the time Hinton's was denied. Thus, the defendants are wrong when they state that Hinton was not granted his promotion "due to his performance of the duties of that higher classification, although Hinton had never been ranked, scored, or placed on a [Civil Engineer-]II register."[44] This was not the special master's reasoning. Moreover, the defendants' and the Adams intervenors' suggestion that McCullough should now be granted a promotion based on a finding that the department discriminated in favor of him can only be characterized by the timed-honored word, 'chutzpah.'

Finally, the special master's recommendation expressed concern that the delay in compliance with provisions related to assignments of duties, rotation of duties, and training, has created tension between the use of reclassification and those portions of the decree. Therefore, though she reluctantly recommended that Hinton be placed in an out-of-classification position, she stated:

> "However, the Special Master does not believe that upon reinstatement, Hinton should

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44. Defendants' brief in opposition to plaintiffs' motion for permanent injunction concerning the revised grievance procedure, filed June 9, 1997 (Doc. no. 1921), at 7. Hinton applied for the CE-II register in February 1993. The state personnel board found him to be eligible for the CE-II exam, but it was never given. Therefore, though qualified to take the exam, he was never given a rank or score, or placed on the CE-II register. *See* recommendation of the special master, entered August 22, 1996 (Doc. no. 1200), at 6.

> automatically be reclassified to a CE III simply because he will be performing duties out of his classification. Such a result would undercut other provisions of the decree, which have sought to limit the use of out-of-classification assignments and the reclassification process as a means of circumventing the normal promotional procedures of the merit system."[45]

In other words, the recommendation specifically condemns the process which the defendants and the Adams intervenors now claim it requires. The recommendation, submitted in August 1996, portends the court's similar observation that the grievance procedure, when used to award promotionson the grounds of out-of-classification assignments, "is on a collision course with the consent decree."[46] The Hinton grievance cannot logically create the right that the defendants and the Adams intervenors claim it extends to employees working in out-of-classification jobs.

Sims Grievance: On May 28, 1996,[47] and December 10, 1996,[48] a special master entered reports that, together and in

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45. Recommendation of the special master, entered August 22, 1996 (Doc. no. 1200), at 37.

46. Order and injunction, entered February 27, 1997 (Doc. no. 1587).

47. Recommendation of the special master, entered May 28, 1996 (Doc. no. 1037).

48. Recommendation of the special master, entered December 10, 1996 (Doc. no. 1427).

part, recommended to the court that the grievance of David Lee Sims be upheld. On June 26, 1996,[49] and February 4, 1997,[50] the court entered orders agreeing with the reports of the special master with regard to Sims. The court agrees with defendants, as well as with the Adams intervenors, that these recommendations and orders have created much confusion — in particular, with regard to the legal basis on which the Sims grievance was upheld. For this reason, the court will review the Sims grievance in some detail

In his report entered on May 28, 1996, the special master wrote that, "The grievant, David Lee Sims, is employed by the Alabama Department of Transportation, 4th Division, as a HMT I[, that is, a Highway Maintenance Technician I]. Mr. Sims was employed as a laborer from January 1984 to July 1985, at which time he was promoted to his present position of HMT I. On August 26, 1992, Mr. Sims filed an application for the position HMT II. Although a vacancy was created several months before the hearing by the retirement of Mr. Eddie Bailey, who had been the only black HMT II in the 4th Division, it does not appear that anyone has been selected for that position. The only explanation given for not hiring or promoting people in the various HMT classifications was that a freeze had been placed on such personnel actions."[51] The special master then concluded that

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49. Order and injunction, entered June 26, 1996 (Doc. no. 1091).

50. Order and injunction, entered February 4, 1997 (Doc. no. 1512).

51. Recommendation of the special master, entered May 28, 1996 (Doc. no. 1037), at 2.

"it is recommended that the Court determine the validity of any such freeze, and, if the Court finds that the freeze does not validly exist, it is recommended that David Lee Sims be promoted to HMT II with retroactive backpay to August 26, 1992, or as of such later date as any such freeze was or may be removed."[52] The special master then entered a formal recommendation that "Subject to the court's finding with regard to the existence and legitimacy of a promotion freeze, the Special Master recommends that Mr. Sims be promoted to HMT II, possibly to the position vacated by the retirement of Eddie Bailey."[53]

By order entered on June 26, 1996, the court adopted the recommendation of the special master stating as follows: "The Special Master recommended that Sims be promoted to Highway Maintenance Technician II subject to a further finding regarding the nature and validity of the hiring freeze. By agreement of the parties, this issue is remanded to the Special Master for initial consideration of the validity and nature of the hiring freeze, not only as to the 4th Division but system-wide, and the significance of the hiring freeze as to the grievance of Sims. The court reserves ruling at this time on the recommendation that Sims receive a promotion. The Special Master shall file a report containing his conclusions by August 1, 1996."[54] *It is important to emphasize at this point that neither the defendants nor the*

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52. *Id.*

53. *Id.* at 10.

54. Order and injunction, entered June 26, 1996 (Doc. no. 1091), at 1.

Appendix B

Adams intervenors took issue with the special master's finding of liability other than as to the issue of the significance of the hiring freeze defense. As a result, because there was otherwise no objection, the court did not independently review the issue of liability except as to the issue of the hiring freeze defense.

In a recommendation entered on December 10, 1996, the special master defined the issue as "the validity and nature of the system-wide hiring freeze, and the significance of the hiring freeze to the grievance of Sims."[55] The special master found that the " 'appointments freeze' . . . has the effect of making enforcement and monitoring of the decree substantially and unnecessarily more onerous."[56] The special master recommended to the court "that David Lee Sims be promoted to Highway Maintenance Technician II, and that Mr. Sims be paid full backpay effective as of January 20, 1994, which is the date Mr. Sims completed the SPD form 40, later approved by his supervisor, confirming that Sims was out of classification . . . the question of the effective date cannot be answered with mathematical precision, and it is found that January 20, 1994, would be reasonable and equitable under all circumstances."[57]

By order entered on February 4, 1997, the court upheld the special master's recommendation.[58] First, the court

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55. Recommendation of the special master, entered December 10, 1996 (Doc. no. 1427), at 1.

56. *Id.* at 15-16.

57. *Id.* at 17.

58. Order and injunction, entered February 4, 1997 (Doc. no. 1512).

rejected the defendants' and the Adams intervenors' contention that, "unless Sims demonstrates that the freeze was discriminatory, he cannot be entitled to any relief in the form of promotion and accompanying backpay."[59] The court stated that "Sims's complaint was not that the hiring freeze was discriminatory, but that the Department of Transportation worked him in an out-of-classification position, and then failed to promote him to the position he *de facto* held, in violation of the existing decrees in effect. To the extent that plaintiffs maintain Sims could legally be denied a promotion which he was otherwise due *only* by the proper implementation of a valid hiring freeze, the court finds that they are correct. Furthermore, the Special Master's first recommendation submits that Sims is entitled to promotion, unless the hiring freeze 'validly exist[s].' Obviously, had there been insufficient evidence to support a finding of a violation, there would be no need to assess a defense, and a waste of time to remand for further hearings. It is clear that the issue before the Special Master and now before the court is defendants' affirmative defense of a hiring freeze valid under the consent decree and other applicable law."[60]

The court went on to write that, "Having defined the question, the court must now determine whether the hiring freeze was, indeed, imposed and conducted in a manner congruent to defendants' obligations to the plaintiff class. To this end, the court engaged in a syllogistic analysis:

> "First, article XV, ¶ 4 states: 'Duties within the job description: The Highway Department will

59. *Id.* at 3.

60. *Id.*

monitor the duties and responsibilities performed by employees with the goal of assuring to the extent practicable that at least 90% of the duties and responsibilities performed by employees on a regular or non-emergency basis are within the job description for job they are holding.'

"Second, Sims was regularly assigned the duties of an HMT II though he held the job title of HMT I. He proved that by January 20, 1994, he was working out of classification at least 87% of the time. Furthermore, the Department of Transportation makes no contention that Sims is not qualified to serve as an HMT II.

"Third, to comply with Article XV, 4, the Department of Transportation was obligated either to work Sims within the HMT I classification he held, or to provisionally appoint him to the HMT II classification in which he was performing nearly 90% of his duties, so long as it was 'practicable.' Because the Department of Transportation did not choose the former, it was obligated to comply with the latter. The department claims, however, that, because of the hiring freeze, it was not 'practicable' to comply with article XV, ¶ 4 by promoting Sims.

"Fourth, the evidence reflects that the hiring freeze was not a practicable impediment, because there were at least two methods which might have permitted Sims's provisional appointment. During the prior hiring freezes in effect in 1993, 1994

> and 1995, the Department of Transportation was granted *blanket* exceptions and made provisional appointments. In addition, there was an option to request *individual* exceptions to this freeze, according to the testimony of Governor James. However, in spite of prior successful use of these exceptions, the Transportation Department did not pursue them on behalf of Sims. The hiring freeze was not a 'practicable' impediment to t[h]e department's compliance with ¶ 4."[61]

The court concluded that "the Alabama Department of Transportation should have, and could have, 'practicably' complied with ¶ 4 through the use of a provisional appointment of Sims to HMT II, but did not do so, in violation of the consent decree."[62]

The court observed that "Defendants and the Adams intervenors object to the recommendation that Sims receive a classification of HMT II, noting that he is on the list of article XV reclassifications that are the subject of motions pending before the court. They argue that permitting his reclassification, while requiring other employees to wait for the court to resolve the article XV issue, is unfair. They point out that other employees — many of them white — have worked out of classification without promotion, which they say demonstrates that there was no discriminatory intent in failing to promote Sims."[63] The court responded, in part, that

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61. *Id.* at 5-7.

62. *Id.* at 7.

63. *Id.* at 7-8.

"This argument has no bearing on the Sims recommendations for two reasons. First, Sims has no obligation to show that the department acted in a discriminatory manner, but only that they failed to conform to the decree. Second, the Special Master used the Form 40 completion date as a reliable point when Sims was clearly working out of classification a vast percentage of the time, but the use of that date does not implicate the article reclassification project. In point of fact, the Special Master's recommendation states that 'the question of this effective date cannot be answered with mathematical precision, and it is found that January 20, 1994, would be reasonable and equitable under the circumstances.' "[64]

The Adams intervenors argue that "The Court's syllogistic argument and analysis in Sims should apply with equal force to all grievances which allege that the department has worked an employee out of classification in violation of Article XV, paragraph 4." "The court presented the [Transportation Department]," according to the Adams intervenors, "with only two choices in Sims: either it had to have worked Sims within his classification or it was obligated to provisionally appointment him to the classification of the job duties he was assigned to perform. The department should not have a different set of options when the out-of-classification employee happens to be non-black."[65] However, the Adams intervenors miss an extremely

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64. *Id.* at 8.

65. Adams intervenors' brief in opposition to plaintiffs' motion for temporary restraining order and/or preliminary injunction, filed April 8, 1997 (Doc. no. 1755), at 10.

important point. It was in the first recommendation and order, and in that recommendation and order only, that it was determined that Sims was entitled to relief, depending on the validity of the hiring freeze. The second recommendation and order address only the issue of the hiring freeze defense. The syllogism given by the court, therefore, would only speak to the department's *defense of the hiring freeze*. The syllogism used by the court would apply equally to the grievances filed by Grant, D'Arville, and McCullough only if they could initially establish that they were otherwise — that is, for reasons other than ¶ 4 of article XV — entitled to relief. In other words, the Adams intervenors skip a critical step in the argument. They would first have to show, as the special master found in his first recommendation, that Grant, D'Arville, and McCullough were entitled to relief and that the department was liable to them, subject to the issue of the validity of an articulated hiring freeze defense. Only then would the question of the validity of a defense come into play, and only then would the syllogism mentioned, and relied upon by the Adams intervenors, be at issue.

Moreover, the court has not, as charged by the Adams intervenors, established "a different set of options when the out-of-classification employee happens to non-black."[66] The Adams intervenors state that"The court explicitly held that Mr. Sims did not have to prove racial discrimination but need *only* show that he was worked out-of-classification in violation of article XV, paragraph 4,"[67] and "the court granted

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66. *Id.*

67. *Id.*

Sims a provisional appointment based *solely* on the finding that his out-of-classification assignment violated Articles XV, paragraph 4's provisions that employees should, to the extent practicable, be worked 90% of the time within their classification." The Adams intervenors charge that "non-black employees of [the Transportation Department] are clearly entitled to have the race-neutral language of Consent Decree I applied to them in the same manner as it has been applied to Mr. Sims."[68] The intervenors mischaracterize the court's holding on the Sims grievance. The syllogism set forth by the court did not, by itself, entitle Sims or anyone else, black or non-black, to relief under ¶ 4 of article XV. Instead, a grievant would first have to show that he or she was entitled to a provisional appointment, subject only to the validity of the Transportation Department's hiring freeze defense. The syllogism was directed only to the department's defense of the hiring freeze.

The Adams intervenors further observe that, "In the Sims grievance, [the Transportation Department] and the Adams Intervenors argue[d] that it was unfair to award Sims reclassification in his grievance when other employees were required to wait for the Court to decide the article XV Reclassification issue." Again, the Adams intervenors' argument takes the issue completely out of context. To be sure, the court stated that "This argument has no bearing on the Sims recommendation for two reasons. First, Sims has no obligation to show that the department acted in a discriminatory manner, but only that they failed to conformed to the decree. Second, the Special Master used the Form 40

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68. *Id.* at 11.

completion date as a reliable point when Sims was clearly working out of classification a vast percentage of the time, but the use of that date does not implicate the article XV reclassification project." But this statement was made only in the context of, and addressed only, the Transportation Department's defense of the hiring freeze. With regard to the hiring freeze, "Sims has no obligation to show the department acted in a discriminatory manner." With regard to only the issue of when Sims's relief should begin, did the court state that "the special master used the Form 40 completion date as a reliable point when Sims was working out of classification a vast percentage of the time." The special master used the Form 40 completion date only because "The question of this effective date cannot be answered with mathematical precision," and the special master regard the January 20, 1994, date "would be reasonable and equitable under the circumstances."[69] The special master made it clear that he was invoking the January 20, 1994, date only as a reference date because it was difficult to establish another point in time.[70]

The following statement by the Adams intervenors is, therefore, incorrect: "When Sims was awarded a provisional

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69. Recommendation of the special master, entered December 10, 1996 (Doc. no. 1427).

70. The plaintiffs point out that although Sims did not most recently apply for a CE position until August 1994, article I imposes a duty to recruit those employees who had applied within the past 10 years for engineering positions. Thus, the special master's choice of a date earlier than Sims's application was not illogical, given that his application was still active at that time.

appointment under the grievance process, the Court found that Sims's entitlement to reclassification under Article XV had 'no bearing' on whether he should be allowed to receive a provisional appointment in his grievance. The result should be no different when non-blacks seek provisional appointments by filing grievances."[71] Sims's proposed reclassification has "no bearing" because the relief granted was not granted purely on the basis of his work out-of-class, but on the special master's finding and recommendation that Sims was entitled to the provisional appointment, unless the hiring freeze actually prohibited it. The reference went to the issue of how the special master had used the January 1994 date as a reference point, rather than basing his recommendation on the out-of-class assignment.

It is also important to explain that the Adams intervenors did *not* object to the special master's initial recommendation that Sims was entitled to relief, subject only to the validity of the hiring freeze. Moreover, the Transportation Department agreed with the special master's initial recommendation that the only dispute for the court was the department's defense of the hiring freeze. The court therefore did not, and did not have to, reach the issue of the special master's finding that was preliminary to the department's defense — that is, that Sims was otherwise entitled to relief. The Adams intervenors' delayed efforts to infer from the court's comments regarding the hiring freeze the meaning that all employees, black or non-black, should now be entitled to relief merely because the court rejected the Transportation

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71. Adams intervenors' brief in opposition to plaintiffs' motion for temporary restraining order and/or preliminary injunction, filed April 8, 1997 (Doc. no. 1755), at 13.

Department's hiring freeze defense, is unsupportable. If the Transportation Department and the Adams intervenors took issue with the preliminary findings of the special master, they should have objected to that aspect of the special master's initial recommendation as well.

The Adams intervenors and the Transportation Department cannot use this unobjected-to aspect of the special master's recommendation to bind the court into using the grievance procedure and article XV, ¶ 4, as a closed and noncompetitive means of promotion in direct conflict with the other provisions in consent decree I which attempt to open the process and make it fair and competitive. *If* this had been the premise of the special master's initial recommendation, and *if* an objection had been made to it, the objection would have been sustained. That such was not a premise upon which the special master was proceeding is made clear in his second recommendation, wherein he stated: "[I]t is more likely that fairness will be achieved if openness is required. It is in this context that the remand of this grievance must be considered."[72] But they did not object, and the Adams intervenors and the Transportation Department cannot bootstrap their acquiescence into a court-approved reintroduction of condemned processes of non-competitive, secretive, handpicking of employees for promotion.

In any event, even if the court's determination of Sims's grievance could be read in the manner the Adams intervenors would have it, this reading would not justify the catastrophic

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72. Recommendation of the special master, entered December 10, 1996 (Doc. no. 1427), at 5.

result that would flow from allowing the grievance procedure to be used as the Adams intervenors want. The disputed reading of a single paragraph cannot be permitted to turn the entire consent decree on its ear, and undo the effects of nearly three decades of litigation. As stated, such a result would conflict with those provisions in the consent decree, article I (recruitment), article IV (provisional appointment), article XI (proportional assignments), article XIV (rotation of job duties), article XV (reclassification), and article XVI (training), which together provide for an open and competitive system in which all persons, regardless of race, may pursue and be considered for promotions, both provisional and permanent, on the basis of merit. An error on the court's part could never justify the jettison of all these other provisions agreed to by the parties, and which comprise a central theme of the consent decree.

Admittedly, the third part of the syllogism — that "the department was obligated either to work Sims within the HMT classification he held, or to provisionally appoint him to the HMT II position in which he was performing nearly 90% of his duties so long as it was 'practicable' " — could be read to mean that this alone would have justified Sims's grievance as well as the grievances filed by Grant, D'Arville, and McCollough. Although the special master failed in his original recommendation to identify what provision of the consent decree I the Transportation Department had failed to meet, it is reasonable to presume, in the absence of a specific finding, that the special master made the findings necessary to support his conclusion that Sims was entitled to a promotion, especially in light of the evidence in the

record of the first hearing that qualified and entitled black employees had not been promoted to HMT-II in Sims's district.

In any event, to the extent the syllogism has led to the impression that merely these circumstances would justify relief for Sims and for any of the other persons — potentially hundreds — in the Transportation Department, the syllogism was incorrect and improvidently stated. The court therefore withdraws it. As the Eleventh Circuit Court of Appeals has noted, "no one is perfect, least of all federal appellate judges, and from our mistakes and oversights spring inconsistent decisions which we must deal with as best we can." *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993). To be sure, this observation applies equally to district judges. Therefore, an incorrect decision or improvident language cannot justify the result that would flow if the grievances were allowed to proceed as the Adams intervenors want.

D.

At first blush, it would appear that, without question, the plaintiffs are entitled to a permanent injunction. The plaintiffs have established, first, that to allow Grant, McCullough, D'Arville, and hundreds of others to obtain promotions through private settlement agreements with their supervisors would violate, in ways almost too numerous to list, both consent decree I and the earlier injunctions in *Frazer*. The plaintiffs have further shown that they would suffer irreparable harm. The Transportation Department informs the court that it has hundreds of grievances currently making their way through the grievance procedure based on

the same or similar grounds as those before the court, and, of course, has recommended hundreds of employees for permanent reclassification based on their performance of out-of-classification duties. Those facts make clear that permitting these appointments to go forward would unleash chaos within the Transportation Department, resulting in a stampede into positions which could render any possible system-wide remedy, based on open competition, moot, as well as impossible to implement. On the other hand, should the positions be opened for competitive selection, all qualified employees, including the grievants, would have the opportunity to compete for these appointments and to be selected if determined to be best qualified. The loss of even an opportunity to compete on a non-discriminatory basis is an injury by itself. *See General Contractors v. Jacksonville*, 508 U.S. 656, 666, 113 S. Ct. 2297, 2303 (1993) (the 'injury in fact' in an equal protection case is loss of even an opportunity to compete for a benefit on a non-discriminatory basis, not just the inability to obtain the benefit).

Additionally, the plaintiffs have demonstrated through witnesses and documents that there are class members qualified and willing to assume the duties and positions which are currently being filled out-of-class, often by employees not eligible to compete for the position for lack of qualifications. One such witness was Rozlyn Cook, hired in 1993 as the first ever black Civil Engineer-IV in the history of the Transportation Department, a job which does not require a college degree.[73] Cook has a B.S. in civil

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73. *See* transcript of third day of hearing on plaintiffs' motion for permanent injunction, held March 26, 1997, at 615-33.

engineering from the University of Alabama, a master's in business administration from Auburn University in Montgomery, a master's in civil engineering from Auburn, is working toward a Ph. D. in civil engineering while working full-time for the Transportation Department, and has significant work experience as an engineer. Cook testified that she was qualified and would have applied for at least seven specific positions, had they been announced and posted and filled on a competitive basis. Instead, those positions are occupied by employees who are performing the duties out-of-class. It is impossible to imagine that anyone with an objective eye would fail to recognize the benefits to the department which could be gained by allowing such class members to compete for positions. Equally compelling are these class members' personal characteristics of motivation and tenacity as they have waited for years in a system that *still* will not let them on certain playing fields. Should the out-of-class positions be filled pursuant to these private, noncompetitive agreements, not only will those opportunities for promotion, even on a provisional basis, be lost, but also those opportunities for early development of skills and abilities will be lost, a benefit which cannot be regained.

Moreover, it cannot be overlooked that the issue of out-of-classification assignments and reclassifications has become vastly complicated by the Transportation Department's and Personnel Department's delays in implementing consent decree I. Time and time again the defendants have failed to meet the obligations and the deadlines to which they agreed.

Appendix B

The unexplained delays in compliance, or even steps toward compliance, with the article IV personnel projects — including the reclassification project — was not brought to the attention of the court until virtually the deadline of its completion date, the spring of 1996, two years after entry of the consent decree. Upon request by the Adams intervenors, joined by the Transportation Department, for imposition of a monitor to speed compliance with articles II, III, IV, and XV, the court stated:

> "THE COURT: . . . I honestly have to admit that I had the impression that come April or March or whatever, there would be full compliance with the articles at issue. And suddenly I find out that not only will those deadlines, or that deadline not be met, but we're talking about an extensive period of time before any such deadline can be met."[74]

The court will not recount the entire history of delays in implementing these articles in this already lengthy opinion, but must note that the unreasonable delays in the personnel projects have contributed substantially to the current state of out-of-classification issues, and continue to complicate this already very complex litigation well into the future. As the Transportation Department counsel stated in the same conversation quoted above, held nearly two years ago,

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74. Transcript of telephone conference, held February 2, 1996, at 11.

> "[DEFENDANTS' COUNSEL]: . . . [I]f Personnel does not move quickly to follow through on its commitments, and to complete the reclassification and the validation, then everybody loses."[75]

The court cannot understand the defendants' delays in implementing a fair and competitive system. All parties agree that it is to everyone's benefit to have an open and competitive system in place. Every Alabama Department of Transportation manager who testified in this hearing before the court agreed that the preferred method for finding those who are best qualified is an open and competitive process. And, the following testimony reflects, in an open and competitive process, resentment is less likely to fester, so that morale and cooperation are better:

> "[PLAINTIFFS' COUNSEL]: As between the out-of-classification process and the provisional appointment process, the better management practice is to use the competitive provisional process, isn't it?
>
> "MR. ARKLE: I agree with that.
>
> "[PLAINTIFFS' COUNSEL]: It is a better management practice to post and allow people to compete, isn't it?
>
> "MR. ARKLE: Yes, sir.
>
> "[PLAINTIFFS' COUNSEL]: It improves employee morale, doesn't it?

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75. *Id.* at 24.

"MR. ARKLE: Yes, sir.

"[PLAINTIFFS' COUNSEL]: It allows you to get a pool of qualified people from which you can get the best qualified person from, correct?

"MR. ARKLE: Hopefully.

. . .

"[PLAINTIFFS' COUNSEL]: But the only way you're going to be able to assemble the widest and best group of applicants is to announce the opportunity and give people a chance to put their hat in the ring, correct?

"MR. ARKLE: I think that would be the preferred way of doing it."[76]

The grievants, Grant, McCullough, and D'Arville, themselves testified that they would prefer to compete for the positions they hold.

"[PLAINTIFFS' COUNSEL]: You don't really want to get positions that you don't deserve, do you?

"MR. MCCULLOUGH: No, sir.

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76. Transcript of first day of hearing on plaintiffs' motion for permanent injunction, held March 24, 1997, at 108-09.

"[PLAINTIFFS' COUNSEL]: You believe in competition and winning things by merit, fair and square, don't you?

"MR. MCCULLOUGH: I have no problem with that, sir.

"[PLAINTIFFS' COUNSEL]: And you're proud of your qualifications, correct?

"MR. MCCULLOUGH: Yes, sir.

"[PLAINTIFFS' COUNSEL]: You're willing to put them up and have them judged competitively with other people that would want to be considered?

"MR. MCCULLOUGH: I have no problem with that, sir."[77]

Yet, the defendants have filed with the court motions delaying the completion of article III validation projects until well into 1999 and beyond, further delaying the establishment of a system of hiring and promotion.[78] The goal of this litigation should be, and is, the creation and maintenance of a level playing field on which all can compete according to

77. Transcript of fourth day of hearing on plaintiffs' motion for permanent injunction, held March 27, 1997, at 741-42.

78. *See* Defendants' motion for modification of court's orders concerning SPD validation projects, filed June 11, 1997 (Doc. no. 1980).

fair and equally enforced rules. Absent extenuating or exceptional circumstances, an employee should have to compete in an open and competitive process for responsibilities and opportunities. In *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994), the Eleventh Circuit Court of Appeals stated that "An end to racial discrimination demands the development of valid, non-discriminatory selection procedures." Consent decree I attempts to achieve this end result. The grievance procedures which the Adams intervenors would now impose on this process, and the wholesale permanent reclassifications the defendants propose as an alternative, would essentially reintroduce the covert and noncompetitive selection process, which existed prior to the entry of consent decree I and which served as a feeding ground for the serious and substantial charges of widespread race discrimination in the department. "Public employers cannot escape their constitutional responsibilities merely by adopting facially-neutral policies that institutionalize the effects of prior discrimination and thus perpetuate de facto discrimination. *See United States v. Fordice*, 505 U.S. 717, 728, 112 S. Ct. 2727, 2735-36 (school desegregation case)." *Ensley Branch*, 31 F.3d at 1575.

Nevertheless, against this compelling background, the court must still hesitate in granting the permanent injunctive relief requested by the plaintiffs. In *Newman v. Alabama*, 683 F.2d 1312, 1318 (1982), the Eleventh Circuit Court of Appeals made clear that the proper method of enforcing a consent decree is not a 'motion to enforce' or similar plea for the court to 'do something,' but rather that a plaintiff seeking to obtain the defendant's compliance with the provisions of an injunctive order move the court to issue an

order requiring the defendant to show cause why he should not be held in 'civil contempt' and sanctioned for his noncompliance. *See also Wyatt v. Rogers*, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996).

Because the issue presented here is a violation of court orders, it is arguable that, under *Newman*, the plaintiffs should have filed a motion for civil contempt rather than a motion for injunctive relief. The resolution of this issue is, however, complicated, by the following circumstances: First, as stated, it apparent that the grievance settlements must not be allowed to go forward. To allow such would not only perpetuate the very secretive and closed practices that consent decree I was intended to eliminate and prohibit, it would allow the discriminatory, often racial, results of those past practices to be memorialized as well. Second, consent decree I expressly provides that the "parties have the right to seek to enforce the provisions of the Decree by filing motions with the Court," and may seek "further relief from the Court," not just as a civil sanction for violations of its provisions, but also to achieve "the intent and purpose for which it has been entered" to the extent the decree itself fails to "achieve" such.[79] It could thus be argued that the parties are not limited

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79. Article XIX, ¶ 6, provides:

> "(c) The parties will have the right to seek to enforce the provisions of this Decree by filing motions with the Court. The provisions of this Decree, and the issues challenged in the case, have been premised upon the existence of the prior remedies ordered in the Frazer/ Ballard case and, to the extent that any future acts or
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> (Cont'd)

by *Newman*'s civil contempt restrictions. Third and finally, the defendants have not themselves raised the issue of whether the plaintiffs should have filed a motion for civil contempt pursuant to *Newman*, and thus it is arguable that the issue has been waived.

But while these circumstances could reasonably support the entry of a permanent injunction despite *Newman*, the court believes it should proceed cautiously and conservatively. The court will therefore limit the relief to declaratory relief, with the added condition that the court will require the plaintiffs to recast the proceedings into a civil contempt context if the defendants object, within 14 days, to the current manner in which the plaintiffs have proceeded. The court has decided to take this tack for several reasons. First, because it was the defendants who first brought to the attention of the court the matter of whether certain employees and supervisors were entering into improper

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(Cont'd)

> omissions violate the remedies ordered in Frazer/ Ballard, the plaintiffs will be entitled to enforce such remedies in this case in the same way that they are entitled to enforce the remedies of any other provision of this Decree.
>
> (d) It is the intent and purpose of this Decree to undo the effects of the past practices which have been the subject of this case and Decree and to prevent further practices which may perpetuate such efforts or otherwise discriminate against the plaintiffs or the class they represent. To the extent that this Decree fails to achieve the intent and purpose for which it has been entered, the parties may seek further relief from the Court."

grievance settlements, it is apparent that the defendants are, like the plaintiffs, concerned that the procedure be applied in a manner consistent with court orders.[80] Under these circumstances, injunctive relief is unnecessary; a declaration is sufficient. *Cf. Wooley v. Maynard*, 430 U.S. 705, 711, 97 S. Ct. 1428, 1433-34 (1977) ("although [o]rdinarily . . . the practical effect of injunctive and declaratory relief will be virtually identical, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary") (internal quotation marks and citations omitted). Second, the recasting of these proceedings into a civil contempt context could be done easily. The issue has been well briefed, and all the relevant evidence has been submitted. Moreover, because the relief sought is more prohibitory than affirmative, the recasting would essentially

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80. In *Newman*, the appellate court also dispensed with the concern that, because a need for wilfulness would most often preclude a finding of civil contempt, adequate civil enforcement would be difficult. The court wrote: "At oral argument, counsel for the State suggested that an adjudication of contempt would never be appropriate in this case because the State's good faith efforts at compliance with the consent decree would preclude a finding of wilfulness which, according to the State, is a necessary element of civil contempt. The Supreme Court long ago disposed of this contention: 'The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. . . . Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act.' *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S. Ct. 497, 499, 93 L. Ed. 2d 599 (1949) (citations omitted)." 683 F.2d at 1318 n.16.

be more one of form than substance, with the court imposing a civil sanction should the defendants proceed further with challenged grievances, rather than a permanent injunction prohibiting these actions. Third, the declaration entered by the court today would further facilitate the recasting by making clear to the parties what the court perceives to be the disputed issue.[81]

III. CONCLUSION

The court cannot overlook that this is the second time that the defendants and Adams intervenors have tried to get the court to allow the wholesale selection of persons for provisional or permanent promotion other than under an open and competitive procedure. Previously, in a memorandum opinion entered on June 19, 1997, the court rejected their effort for the reclassification of upwards to 800 employees under the procedures of article XV.[82] The court held that the reclassifications must be strictly limited to those eligible employees working out of class at the time of the time of the entry consent decree I in 1994. The court explained that the expanded reclassification, as sought by defendants and the

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81. With the declaratory relief entered today, the preliminary injunction entered April 9, 1997 (Doc. no. 1760), is no longer necessary. However, because the defendants and the Adams intervenors have appealed that injunction to the Eleventh Circuit Court of Appeals (Doc. nos. 1801 & 1803), the court cannot vacate it. The court will, however, vacate it upon remand.

82. Memorandum opinion, entered June 19, 1997 (Doc. no. 1941).

Adams intervenors, would "permit[ ] precisely the type of noncompetitive, hand-selection and favoritism that was to be abolished and protected against by the decree."[83]

With the proposed private grievance settlements, the Adams intervenors are essentially seeking again to circumvent open and fair competition for jobs in the Transportation Department. What the court said in its June 19, 1997, memorandum opinion applies with equal force to this effort: It would "permit[ ] precisely the type of noncompetitive, hand-selection and favoritism that was to be abolished and protected against by the decree."[84]

All parties to this litigation must understand that when it comes to selection for jobs in the Alabama Department of Transportation, this court will initially default in favor of a procedure that allows for open and fair competition. Any effort to convince the court otherwise will always be an uphill one. Therefore, the faster the Transportation Department and the Personnel Department can get such an open and competitive procedure in place for all selections, the better off all will be.

Accordingly, it is the ORDER, JUDGMENT and DECREE of the court that the plaintiffs' motions for permanent injunctions, filed March 10, 1997 (Doc. no. 1635) (treated as a motion for permanent injunction by order entered on March 11, 1997 (Doc. no. 1643)), and March 28, 1997

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83. *Id.* at 14.

84. *Id.*

(Doc. no. 1716) (treated as motion for permanent injunction by order entered March 31, 1997 (Doc. no. 1726)) are granted to the extent that it is declared as follows: Provisionally appointing, promoting, or paying backpay to employees Andrew McCullough, Michael Grant, and John D'Arville pursuant to the grievances they filed would violate the consent decree entered on March 16, 1994 (Doc. no. 553) and the orders entered in *United States v. Frazer*, civil action no. 2709-N (M.D. Ala.).

It is further ORDERED that, unless defendants Alabama Department of Transportation and Alabama State Personnel Department note an objection within 14 days, the court will assume that they do not wish that these proceedings be recast as civil contempt proceedings.

DONE, this the 3rd day of March, 1998.

s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 14, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-6347

JOHNNY REYNOLDS, individually on behalf of himself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated,

Plaintiff-Appellee,

CECIL PARKER, ROBERT JOHNSON, et al.,

Intervenors-Plaintiffs-Appellees,

C. CAMPBELL WILSON,

Intervenor-Plaintiff,

WILLIAM ADAMS, CHERYL CAINE, et al.,

Intervenors-Plaintiffs-Appellants,

versus

G.M. ROBERTS, in his official capacity as Director for the Alabama Department of Transportation, et al.,

Defendants.

Appendix C

No. 98-6192

JOHNNY REYNOLDS, individually and on behalf of himself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated,

Plaintiff-Appellee,

CECIL PARKER, ROBERT JOHNSON, et al.,

Intervenors-Plaintiffs-Appellees,

WILLIAM ADAMS, CHERYL CAINE, et al.,

Intervenors-Plaintiffs-Appellants,

versus

G.M. ROBERTS, in his official capacity as Director for the Alabama Department of Transportation, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before TJOFLAT and DUBINA, Circuit Judges, and STORY*, District Judge.

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* Honorable Richard W. Story, U.S. District Judge for the Northern District of Georgia, sitting by designation.

Appendix C

PER CURIAM:

The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX D — CONSENT DECREE I OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION DATED AND FILED MARCH 16, 1994

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

CONSENT DECREE I

This lawsuit was filed under Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 1981 and § 1983 alleging racial discrimination in employment. The case has been certified and maintained as a class action on behalf of the following:

A. All black merit system employees employed by the Alabama Highway Department at any time since May 21, 1979, with said class represented by plaintiffs Johnny Reynolds, Ouida Maxwell, and Martha Ann Boleware; and

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B. All black non-merit system employees of the Alabama Highway Department and all black non-employees who have unsuccessfully sought employment as merit system employees with the Alabama Highway Department at any time since May 21, 1979, with said class represented by plaintiffs Peggy Vonsherrie Allen and Jeffrey Brown.

A recess in the trial of the case for the purpose of settlement negotiations has resulted in the Consent Decree which follows. The following terms and provisions of this Consent Decree are accordingly agreed to in final and complete resolution of all class issues which have been asserted in the case, subject to the provisions of this Decree providing for further proceedings, including but not limited to Articles 20 and 21.

ARTICLE ONE
RECRUITMENT

A. EXPANDED RECRUITMENT PROGRAM:

Highway will, within 60 days of approval of the Consent Decree, develop a written plan for recruitment which will contain at least the following provisions:

1. Recruitment of engineering students: Direct recruitment of every black civil engineering and civil engineering technology student enrolled in colleges in the Southeastern United States having black persons enrolled in such programs and at the Howard University Engineering School, with the following minimum efforts for each person:

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(a) Initial recruitment efforts to be initiated for each such person no later than one year after enrollment in such program.

(b) Direct contact with such persons throughout the remainder of their enrollment in such program, with a minimum of one contact each six months until one year after graduation or the candidate is placed on the GCE register, whichever occurs first.

(c) Documentation in a standard format of each contact with such student or graduate and the reason they did not apply or were not placed on a register.

(d) Encouragement and assistance in applying for the position of GCE and other appropriate positions.

(e) Monitoring of the progress of each such person's application through the application, examination, registration, certification and selection process and assistance at appropriate points that may enhance their eventual availability to the Highway Department on COE's.

(f) Development of a program to encourage and assist such students and/or graduates in taking and satisfying the requirements of the EIT, registration with the appropriate licensing agencies, and eventual licensing by such agencies.

(g) Use of monetary incentives to attract black candidates by starting persons having the EIT in a GCE pay grade no lower than pay grade 2.

(h) The Highway Department will fund a program in cooperation with Alabama A&M University to increase awareness of and interest in civil engineering careers with the Highway Department and provide preparation for the FOE examination for students in civil engineering and civil engineering technology programs. Such funding will be $20,000.00 per year for a duration of 5 years.

(i) Encouragement and assistance in applying for the position of PCET and revision of certain aspects of PCET program so as to increase the availability of black engineers through such program.

2. Recruitment of persons with EIT or RPE Certification: Direct recruitment to the extent practicable of every black person who holds the EIT or a professional engineering license issued by the State of Alabama and who has a degree in civil engineering or civil engineering technology, with the following minimum efforts for each such person:

(a) Initial recruitment efforts to be initiated for each such person no later than 60 days after entry of the Decree.

(b) Continuous recruitment efforts until the person states that they are not interested in working for the Highway Department or they are placed on an appropriate register for GCE, GRE, or PCE.

(c) Documentation in a standard format of each contact with such person and of the reason they did not apply, were not placed on a register or COE, or were not selected.

(d) Encouragement and assistance in the process of applying and being examined, registered, certified and considered.

(e) Monitoring of the progress of each such person's application through the application, examination, registration, certification and selection process and assistance by Highway at appropriate points that may enhance their eventual availability to the Highway Department on COE's.

(f) Use of monetary incentives to attract black candidates by starting persons having the EIT in a GCE pay grade no lower than pay grade 2.

3. *Recruitment of Persons with CE or CET Degrees*: Direct recruitment of every black person who can reasonably be identified as holding a degree in civil engineering or civil engineering technology by means of Highway requesting the names and addresses of such persons from colleges in the Southeastern United States having such programs and at Howard University and contacting such persons as are identified by such means and by taking the steps set forth in Paragraph 2 above with respect to such persons.

4. *Recruitment for higher level Engineering jobs*: For the Engineering positions above Civil Engineer I, the program will identify special means by which qualified black candidates can be recruited and, within the limits of merit system rules, employed. The attorney for the class shall have the right to review and object to the means adopted and to seek further relief by petitioning the Court for such relief.

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5. *Persons to be included in recruitment efforts*: The expanded recruitment program will include, but not be limited to, the following:

(a) Recruitment in the Southeastern United States at educational institutions having black students enrolled and at Howard University in educational programs related to the job classifications listed in Paragraph 19 of Section B of this Article.

(b) Recruitment addressed to —

(i) Current employees regarding career paths/ better job opportunities.

(ii) Applicants rejected or not selected.

(iii) Employees certified but not selected regarding potential opportunities in other jobs.

(iv) Applicants within the past 5 years who have not reapplied or kept their eligibility active or current, except the period shall be 10 years for the engineering job classes.

(v) Eligibles who have been certified-out from Personnel to Highway during the past 5 years but failed to schedule or appear for an interview, except the period shall be 10 years for the engineering job classes.

(vi) Existing eligibles who may be able to improve their score or rank by being reexamined or by further training or education.

(vii) Past employees who may have left the Highway Department because of a perception of limited opportunities.

(viii) Employees who may be able to advance through reclassification or reallocation.

(ix) Any other potential source of candidates or means by which job opportunities for black persons may be improved.

6. *Encouragement and assistance*: The expanded recruitment program will include verbal and written encouragement and assistance by the Highway Department with applicants and potential applicants to offer assistance or advice in moving through the application, examination, certification, and selection process. The phrase "potential applicants" as used in this Paragraph 6 means:

(a) Persons who have to the knowledge of the Highway Department expressed an interest in applying;

(b) Persons who the Highway Department has reason to know may be interested in applying;

(c) All black students in civil engineering or civil engineering technology programs at colleges in the Southeastern United States having such programs and at Howard University;

(d) Such persons as are identified by the procedure set forth in Paragraph 3 above as graduates of civil engineering or civil engineering technology programs in the 10 years prior to the effective date of this Decree.

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7. Evaluation: The steps taken in connection with and the results of the expanded recruitment program will be evaluated at least quarterly by the Highway Director and the Personnel Director or their designees. The result of such evaluation and the data used in the evaluation process will be reported in the quarterly reports required by the Settlement Decree. Personnel will institute a system of tracking the source of the applicant's knowledge of job opportunities and recruiting efforts to which he/she was subject, which at a minimum, will include responses to inquiries of the applicant or his application and computerized tabulation of such data into a report which allows monitoring of the effectiveness of recruiting sources. Such data shall be provided to the plaintiffs' attorney within 30 days of the end of each calendar quarter of the year during the duration of this Decree.

8. Frazer/Ballard: The expanded recruitment program will include recruitment which extends beyond the past and existing recruitment activities by Highway and beyond the recruitment obligations provided for in *Frazer/Ballard*.

9. Nationwide advertising: Such expanded recruitment program will include special nationwide advertising campaigns designed to reach qualified black candidates.

10. Intensified Recruiting: Personnel will conduct monthly reviews of the racial composition of all registers for the classes listed in Paragraph 19 of Section B of this Article. Whenever the black proportion of eligibles who are reachable on the Register for the next three vacancies for such classifications is less than 15% of the total eligibles on such Register for such job, the Personnel Department will

so notify the Highway Department, and the Highway Department within 10 days of such notice will commence special intensified nationwide recruiting and advertising aimed at increasing the total number of black eligibles on such Register for such job classification to the 15% level. Such intensified recruiting will also consist of the following:

(a) Highway will pay the expenses associated with bringing top black candidates to Alabama in order to provide them with the opportunity to see the work environment and be interviewed; provided, however, that such expenses will not exceed 10 persons per year up to a maximum of total expenses for all such 10 persons together of $10,000 per year. Provided that in the event the Highway Department has not achieved the goals provided for by Article Eleven with respect to the jobs listed in Paragraph 19 of Section B of this Article by the end of a calendar year during the term of this Decree, the maximum in the next succeeding calendar year will be up to 15 persons and $15,000 total expenses for all 15 such persons together. Provided further that the obligations provided for by this sub-paragraph (a) shall not be extended beyond December 31, 2000 and that the Highway Department will decide which black candidates will be paid such expenses within the spirit or the purposes of this Decree.

(b) Highway will engage in the efforts described in Paragraph 2 above of this Article One of this Decree;

(c) Highway will utilize monetary incentives when necessary to attract such black candidates by starting

them in a pay grade no lower than pay grade 2 or at such other level within the permissible range as is necessary for them to accept employment with the State of Alabama;

(d) Highway will utilize further monetary incentives to attract such black candidates for the PCET, GCE, GRE and PCE jobs by starting those who had at least a 3.5 average in college and 12 months of civil engineering experience at no less than Step 4 of Pay Grade 2;

(e) For advanced entry in job classifications above the entry level, Highway will provide such orientation and training as is reasonably necessary to allow the black candidate to make the transition to the methods of work and organization of the Highway Department and will inform the applicant or potential applicant that such special efforts will be made so that advanced entry is both feasible and successful;

(f) Highway will document any difficulties or obstacles encountered in recruiting or appointing each such black applicant and, to the extent practicable, will develop and implement policies or programs aimed at removing such obstacles or recruitment.

11. Colleges: Geographic Scope:

(a) The State Highway Department will conduct a program of on-campus recruiting at the following colleges and universities:

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— Alabama A & M University

— Alabama State University

— Auburn University

— Auburn University in Montgomery

— Miles College

— Stillman College

— Talladega College

— University of Alabama

— University of Alabama in Birmingham

— University of Alabama in Huntsville

— University of South Alabama

— Georgia Institute of Technology

— Southern University

— Florida A & M University

(b) The expanded recruitment program will utilize a wider-geographical area than Alabama which encompasses all colleges having black students enrolled in any educational program leading to satisfaction of the educational

requirements of the jobs subject to Paragraph 19 of Section B of this Article in the Southeastern United States and Howard University.

12. Study of other recruitment programs: The recruitment efforts of other employers outside of state government will be studied and, if requested by the plaintiffs, an outside expert on recruitment would be consulted in devising the expanded recruitment program.

13. Dissemination of information: The expanded recruitment program will include the dissemination of written information to applicants regarding the application, ranking, certification, and selection process so that all applicants have equal opportunity to learn how to maximize their chances of being ranked higher on registers for Highway Department jobs, of being certified to the Highway Department, and being selected by the Highway Department.

14. All recruitment activities shall be documented in a manner, means and format agreed between the parties.

15. (a) At least 50% of the on-campus recruiting each calendar year during the term of this Decree will be made by a black staff member of the State Highway Department assigned to recruiting. When any on-campus recruiting during the term of this Decree is made by more than one State Highway Department recruiter on one recruiting trip, at least one of such recruiters is to be black.

(b) The State Highway Department will provide to offices of the Alabama State Employment Service announcements of openings for or examinations for the jobs set forth in Section 19 of Section B of this Article.

(c) On a semi-annual basis during the terms of this Settlement Decree, the State Highway Department will place a notice as set forth in the attached Appendix __ inviting applicants to apply with the State Personnel Department for State Highway Department jobs in the following newspapers:

— The Birmingham Times

— The Montgomery Tuskegee Times

— The Mobile Beacon

16. Nothing contained in this Decree is intended or shall be construed to limit the colleges or sources at which the State Highway Department conducts any recruitment.

17. The Student Aide Co-Op program presently in effect will remain in effect during the term of this Decree.

18. The recruitment demands and standards imposed upon the State Personnel Department and the State Highway Department under the Decree entered in *United States v. Frazer*, 317 F.Supp 1079 (M.D. Ala. 1970), and as amended from time to time, will continue to guide such Departments in its recruitment during the duration of this Decree.

B. JOBS TO WHICH THE EXPANDED RECRUITMENT PROGRAM WOULD APPLY:

19. Jobs covered by the program: The expanded recruitment program will apply to the following merit system job classes at the Highway Department:

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(a) The PCET, GCE, and GRE classes.

(b) The Professional Civil Engineer and Civil Engineer classes.

(c) The Accountant and Auditor job classes, the Project Cost Auditor job classes, the Right-of-Way job classes, the Engineering Assistant job classes, Highway Maintenance Superintendent, Chemist I, Community Planner I, Electrical Engineer, Geologist I, Highway Office Manager, Programmer I, Programmer-Analyst I, Transportation Planner I, and such other job classes for which an open competitive job announcement is utilized and the percentage of black persons on the Register for such job is more than 5% lower than the availability of persons in the Alabama labor force for such job or job family, provided, however, that if the Highway Department does not anticipate an opening in the coming 12 months in such a job, such expanded recruitment programs will not apply with respect to such job. In the event the Highway Department determines that it does not anticipate such an opening in the coming 12 months, it will notify the plaintiffs' counsel of such determination and the job or jobs in which it does not anticipate such an opening.

ARTICLE TWO
MINIMUM QUALIFICATIONS

1. Limitation on the use of minimum qualifications: Minimum qualifications will not be utilized on examination announcements or to preclude an applicant from examination

unless the minimum qualification bears a manifest relationship to skills, knowledges, or abilities necessary to the performance of the job at entry without a brief orientation period and such skills, knowledges or abilities are not addressed in the examination process.

2. Consultation:

(a) Subject to Article Four on Implementation of Personnel Projects, Personnel will forthwith utilize a content validation procedure to determine the appropriate minimum qualifications for the Highway Department job classes. Such determination and the SPD validation procedure will be subject to challenge by plaintiffs and no new minimum qualifications will be implemented without approval by the plaintiffs or the Court.

(b) Appointments in the interim between the effective date of this Decree and the completion of the requirements of this Article shall be governed by the provisions of Article Four of this Decree entitled Implementation of Personnel Projects.

3. Use of Minimum Qualifications In Examinations: Nothing in this Article of the Consent Decree shall preclude the use of minimum qualifications as a part of the examination process provided that such minimum qualifications satisfy Paragraph 1 of this Article and have been determined to be valid within the meaning of the Uniform Guidelines of Employee Selection Procedures by the State Personnel Department.

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4. High School Diploma and GED: The State Highway Department will be permitted to use a high school diploma or a GED as a minimum qualification after it has been validated in accordance with the requirements of this Decree (including Paragraph 1 of this Article) and the Uniform Guidelines on Employee Selection Procedures by the State Personnel Department.

ARTICLE THREE
SCORING AND RANKING

1. Cooperation with the State Personnel Department: The Highway Department will cooperate with the Personnel Department in formulating and implementing the steps to be taken by the Personnel Department pursuant to the scoring and ranking provisions of the Settlement Decree.

2. Highway Department program: The Highway Department will develop and implement a program designed to achieve the following:

(a) Assuring to the extent practicable that black employees are provided with equal opportunities to be assigned to duties of the jobs they hold comparable to the assignment of white employees on such job to such duties, provided that this is not intended to require all employees on a job to be assigned to the same duties or to require the assignment of anyone to duties which they are not qualified to perform after normal training and/or orientation.

(b) Developing a procedure for informing employees regarding career paths within the Highway Department.

(c) Providing an equal opportunity to black employees for participation in training programs comparable to training programs in which white employees on the same job participate.

(d) Developing a system for monitoring the progress of the above procedures.

3. Plan to monitor adverse impact:

(a) Personnel will maintain adequate means for measuring and monitoring the adverse impact of screening and selection criteria used in eligibility for examinations, ranking, scoring and forming Registers or COE's and will submit such means to the plaintiffs' attorney for review and comment.

(b) Within 90 days of the approval of the Decree, the Highway Department will submit its plan for measuring and monitoring the impact of the selection criteria used in appointments.

(c) In the absence of agreement, the Court will decide the adequacy of the means of measurement and monitoring.

4. Validation of criteria:

(a) Personnel will develop and thereafter use only selection criteria and procedures that have been validated in accordance with the Uniform Guidelines on Employee Selection Procedures. For the SPD Project job classes,

such validation will be completed within two years of the effective date of this Decree; for all other Highway Department jobs they will be completed within a reasonable period after the effective date of the Decree, subject to the right to seek further relief set forth in Paragraph 4 of Article Four on Implementation of Personnel Projects.

(b) Appointments in the interim between the effective date of this Decree and the completion of the requirements of this Article shall be governed by the provisions of Article Four of this Decree entitled Implementation of Personnel Projects.

5. Choice of examination types: The choice among examination types (written, T & E, structured oral interview, etc.) will be made based on the results of the job analysis; provided, however, that such analysis shall be subject to challenge by the plaintiffs in the event it is found to be inadequate to achieve the purposes of this Consent Decree. With respect to written tests:

(a) SPD will use written tests only when:

(i) The minimum qualifications for the class confirms that all candidates taking the test have the necessary reading abilities to pass the test, and either:

(ii) The job analysis supports the need to read and understand written instructions and/or information; or

(iii) A large number of candidates must be screened.

(b) All written tests which are developed will be:

(i) Checked for reading level to assure that it is at no higher level than defined by the minimum qualifications; and

(ii) Reviewed by a socio-linguistic specialist to identify and correct any wording which may introduce a cultural bias.

(c) SPD will actively look for alternative selection procedures which may have less adverse impact.

6. ***Pending Court Approval***

7. Validation studies for written tests will be conducted in accordance with the Uniform Guidelines on Employee Selection Procedures.

8. During the selection of examination type and development of the selection instrument, SPD will search for effective alternative devices which would have lesser disparate impact. Where a selection device shows substantial disparate impact upon use, SPD will search for effective alternative devices which would have lesser disparate impact in future selection decisions, and will utilize such devices unless impracticable; provided, however, that this paragraph, and this Decree as a whole, will not modify or affect any obligation of the parties bound by this Decree which arises under federal or state law or regulations, the remedies and requirements set forth in *Ballard/Frazer*, or the Uniform Guidelines on Employee Selection Procedures.

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9. Content of examination announcements: Prior to administering examinations after the effective date of this Decree, defendants will develop, in cooperation with a qualified industrial psychologist, an examination announcement or material accompanying the application informing prospective applicants of the nature of the selection procedures, the characteristics the procedures are designed to assess, and the information with which the applicants are expected to be familiar on the examination.

10. Documentation: Defendants will make available to plaintiffs' attorney sufficient information and documentation to show that the development and implementation of the selection procedures conform to the Uniform Guidelines. All validation efforts shall be documented in writing and make available to plaintiffs' counsel for review at least 30 days before an Examination Announcement or other use of the examination which is the subject of such validation effort.

11. Except to the extent that service ratings are a component of the examination, all examinations shall be administered by Personnel without involvement of any Highway employees in any aspect of the administration, including the scoring, ranking, evaluating, grading, or assessing of applicants; provided, however, that the parties may agree to relax this requirement for any future selection procedure that utilizes Highway personnel in administration of valid examinations which necessitate such involvement by Highway, such as assessment centers, or other structured examination procedures, and provided further that nothing contained in this Decree will preclude or limit the use by Personnel of Highway employees as "subject matter experts" in a validation project.

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12. Prohibition of Divulging Contents of Examinations: Personnel and Highway will develop means to prevent, to the extent practicable, activities which have the purpose or effect of disclosing the content of examinations to applicants or examinees, or potential applicants or examinees, prior to administration of examinations, or which have the purpose or effect of aiding some applicants or examinees in the examination process in ways which are not available to all applicants who are eligible for the examination; provided, however, that this paragraph will not be used to inhibit or prevent any formal training offered equally to all applicants or potential applicants so long as such training is disclosed to the Personnel Department in writing and that Department does not find, after review, that such training compromises the validity or reliability of the examination or the examination process. The means used to prevent potential compromise of the examination process will include, but not be limited to; (1) a policy which prohibits the types of activities listed above and which is disseminated to all applicants or potential applicants with a warning that violation of the policy may result in discipline (up to and including discharge from employment), and/or disqualification from examination process for a prescribed period of time of not less than one year; and (2) a set of procedures for monitoring and investigating activities which may compromise the examination process; provided nothing in this paragraph shall prohibit applicants from forming study groups whether or not these study groups admit all applicants.

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ARTICLE FOUR
IMPLEMENTATION OF PERSONNEL PROJECTS

1. This Decree establishes a number of duties for Personnel, including four projects that will involve substantial studies:

(a) Validation of minimum qualifications (Article Two);

(b) Examination validation (Article Three);

(c) Study of multi-grade job (Article Fifteen); and

(d) Analysis of individual reclassification requests (Article Fifteen).

2. Projects (a) and (b) set forth in Paragraph 1 above will focus on the following principal Highway Department classifications: Highway Maintenance Technician, Engineering Assistant, Professional Civil Engineer Trainee, Graduate Civil Engineer, Graduate Registered Engineer, Civil Engineer, Professional Civil Engineer, Right-of-Way Specialist, Project Cost Auditor, and Highway Office Manager. The classifications listed in the preceding sentence are referred to in this Decree as the "SPD Project Classes." The precise sequencing is to be determined by Personnel, provided that the goal is to complete all four projects within two years of the effective date.

3. Upon approval of this Decree, then-existing Registers for the SPD Project Classes will be abolished. During the

period between the effective date of this Decree and the creation of new registers using newly validated minimum qualifications and examinations, vacancies in the SPD Project Classes identified in Paragraph 2 above may be filled by provisional appointments, which appointment may extend to the time of creation of such new registers. ***LAST SENTENCE PENDING COURT APPROVAL***

4. With respect to non-SPD project classes, if plaintiffs contend that existing registers do not provide sufficient opportunity for the Highway Department to satisfy the goals or minimum number of appointments required under this Decree, then the plaintiffs may seek further relief from the Court.

ARTICLE FIVE
BANDED SCORING

PENDING COURT APPROVAL

ARTICLE SIX
REGISTERS

1. Continuous registers: With respect to the SPD Project Classes, the Personnel Department will use continuous registers. Continuous registers will also be used for any job classification that has been subject to continuous registers at any time since 1979, and for any other job classification for which Continuous Register will aid recruitment of black applicants unless Personnel determines that current registers would enhance the prospects of black applicants and potential black applicants. With respect to

non-SPD Project Classes, if plaintiffs contend that existing registers do not provide sufficient opportunity for the Highway Department to satisfy the goals or minimum number of appointments required under this Decree, then the plaintiffs may seek further relief from the Court.

2. *Promotional registers*:

(a) In the establishment of Promotional Registers for the SPD Project Classes, the weight to be given to the service ratings component in the ranking of eligibles on the register will be 10% percent and not higher of the total ranking score. This provision does not otherwise restrict the utilization of service ratings, including specifically the banding of service rating scores, subject to Article Five of this Decree regarding Banding practices.

(b) Eligibility for placement on Promotional Registers for the classes described in the SPD Project Classes will not be restricted to service in the immediately preceding feeder job (including EA-3 as a feeder for CE-1), and will include no residency requirement higher than one year of service in the line of progressions leading to the job or experience at the level of such service; provided, however, that the applicant has the work experience, degree, license, or certification which is a minimum qualification for the job to be filled on an open-competitive basis; and provided further that this Paragraph 2(b) will not apply to the following:

a. PCE-2 and above;

b. GRE;

c. Highway Maintenance Superintendent;

d. As to CE-3 and above, the procedure will be that —

— A CE-3 may advance to CE-5 (but not higher) without service as a CE-4;

— A CE-4 may advance to CE-6 (but not higher) without service as a CE-5; and

— A CE-5 may advance to CE-7 without service as a CE-6.

e. In the event any grade of the multi-grade jobs listed above is restructured in or as a result of the job classification study provided for by Paragraph 3 of Article Fifteen ("Reclassification and Reallocation"), the provisions in sub-sections a and d will remain in effect with respect to the restructured grades.

(c) The provisions of this Paragraph 2 are subject to Paragraph 8 of Article Nineteen ("General").

3. Purging from a register: The following provisions will be adopted with respect to the purging of a name from a register for the SPD Project Classes:

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(a) Personnel may continue to purge names from continuous registers after two years.

(b) At least 45 days before a name is to be purged from a continuous register pursuant to (a), Personnel will give written notice to the applicant and to Highway and shall maintain adequate documentation of such notice.

(c) The Highway Department will thereupon contact or attempt to contact the person whose name is proposed to be purged to inform them of their right to reapply for the job and to otherwise recruit and encourage such person to maintain their eligibility. Any black applicant who requests that his name remain on the register will not be purged pursuant to (a). The Highway Department shall notify Personnel of the completion of such efforts and the response, if any, of the applicant within 40 days of receipt of Notice of proposed purging from Personnel. If the applicant has not indicated he wishes to remain on the Register, copies of such notice to Personnel from the Highway Department will be furnished to plaintiffs' counsel at the time such Notice is sent to Personnel. Personnel shall not purge the names of any persons until after receipt of such response from the Highway Department. Within three days of such purging, Personnel shall notify the applicant that he has been removed from the Register and of his right to be reinstated to the Register upon request. Adequate written or computerized documentation of all such contacts, attempts, encouragement, recruitment and requests shall be maintained and available for inspection by the plaintiffs' counsel.

(d) Personnel may continue to place in an inactive status the name of any person who declines three opportunities for consideration or selection in writing.

(e) Whenever a black applicant is to be made inactive pursuant to (d), Personnel will give notice to the applicant and Highway at least 45 days before the applicant is inactivated. Highway will then make the efforts required by (c). Any black applicant who thereafter requests reactivation will be reactivated.

4. Abolition of registers: The following provisions will be adopted with respect to the abolition of current registers for the SPD Project Classes:

(a) A register will not be abolished or replaced without an analysis of the impact of such replacement on black applicants and the goals set out in this Decree, and will be abolished only when the age and composition of the register, new job analysis, or other factors indicate that a new register should be found.

(b) When a register is abolished or replaced, Personnel will, two weeks before the application deadline for the new examination, notify Highway of the identify of any black eligibles on the abolished or replaced register who have not reapplied for the new register and Highway will then engage in the special recruitment efforts to encourage applications set forth in Paragraph 3 (c) immediately above.

(c) All black eligibles on the abolished or replaced register who reapply for the new register shall be placed on such new register.

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ARTICLE SEVEN
CERTIFICATES OF ELIGIBLES

1. Request for COE: When a permanent opening occurs in a classified position at the Highway Department and such job opening is to be filled, the Highway Department will request a COE for such job opening within 30 days, provided that —

(a) This is not intended to require the filling of a job and will apply only where it is Highway's decision to fill the job.

(b) There is a requisition and funding for such job.

(c) This will not preclude a subsequent filling of the job by a request by the Highway Department for a COE, provided that the Highway Department gives notice in writing to the Personnel Department of non-discriminatory justification for not having requested a COE within such 30 day period and subsequently requesting a COE.

(d) For any permanent opening in a classified position at the Highway Department which is not to be filled through a COE within 30 days of any event which causes the permanent opening, the Highway Department shall give notice to Personnel of the reason for not filling such opening.

2. No delay in requesting a COE: The Highway Department will not delay requesting a COE for a permanent

opening in a job which is to be filled for any purpose of avoiding or attempting to avoid the certification or appointment of black eligibles on the register for such job.

3. Register to be used for COEs: ***PENDING COURT APPROVAL***:

* * *

4. Pre-screening:

(a) The Personnel Department will not provide the Highway Department with the means of knowing the identities or the racial composition of potential Certificate of Eligibles before the official issuance of such a Certificate.

(b) The Highway Department will take appropriate action to assure that officials and employees of the Highway Department do not have access to and do not use information about the probable composition of alternative Registers or Certificates of Eligibles in determining when to fill positions, from what Registers to fill positions, or any other advance information which may have the purpose or effect of favoring or disfavoring persons of one race over another.

5. TIED SCORES: Where black eligibles and white eligibles would appear on the same Certificate of Eligibles with tied scores, Personnel will continue to certify all such eligibles but will use a procedure to be developed by it to

break the tie. The plaintiffs' attorney will have the right to review and object to the procedure used and to petition the Court with regard to the subject before it is implemented.

ARTICLE EIGHT
INTERVIEWS BY THE HIGHWAY DEPARTMENT

1. Interviews of black eligibles on a COE: When black eligibles appear on a COE, Highway will schedule interviews with them and will conduct the interview before deciding whom to select for the job; provided, however, that if a black eligible cannot be located, fails to respond or declines an effort to schedule an interview after the efforts required by Paragraph 3 of this Article ("Failure to Appear for Interviews"), Highway may fill the position without conducting an interview of that applicant.

2. Standard interviews: The Highway Department will develop and use standard format interview questions which will to the extent practicable be designed to elicit objective non-discriminatory job related information relating to the applicant and the job to be filled.

3. Failure to appear for interviews: If a black eligible on a COE fails to appear for a scheduled interview or fails to respond to the Highway Department's invitation to schedule an interview, the Highway Department will make reasonable and good faith efforts to contact such person to advise him or her of the importance of the interview and to provide another opportunity for an interview.

4. Interviewers: For all Highway employees who conduct interviews, the Highway Department will develop

and implement a training program in interviewing techniques and procedures for the purpose of minimizing to the extent practicable any disadvantage to black eligibles in the interview process.

5. Forms to be filled out by interviewers: The Highway Department will develop and use forms to be filled out by the interviewer or interviewers which will list the job-related qualifications of each eligible interviewed.

ARTICLE NINE
APPOINTMENTS

1. Monitoring by the EEO Bureau:

(a) The racial composition of appointments to each job will be monitored by the Highway Department's EEO Bureau on a periodic basis in comparison to the racial composition of eligibles certified for such job to determine the selection rate of black eligibles.

(b) The periodic basis for such monitoring will include appointments on the following intervals: quarterly, annually, 3 years, 5 years, and such other periods as are necessary to assess the Highway Department's progress.

(c) The Highway Department's EEO Bureau shall monitor recruitment progress and the selection process so as to assure that the purposes of this Decree and Highway's Affirmative Action Program are fulfilled. To this end, such EEO Bureau shall develop a systematic

written program for such monitoring within 90 days of the effective date of this Decree and will submit it within 10 days thereafter to plaintiffs' counsel for comments and review.

2. Form as to the eligibles selected: In connection with appointments, the Highway Department will develop and use a form which will state the reason that the eligible selected for appointment is regarded as the best qualified candidate for the job.

3. Role of race: ***PENDING COURT APPROVAL***:

4. Prohibitions in connection with appointments: The Highway Department will not avoid or attempt to avoid the appointment of black eligibles on registers by means of canceling requests for certifications, returning certifications, requesting the abolishment of registers, delaying requests for certifications or appointments, or any other means.

5. Effort to include black employees in the interview and selection process: In conducting interviews and in making appointments, the Highway Department will endeavor to the extent practicable —

(a) To include black employees among the interviewers, and

(b) To include black employees among the persons making decisions regarding the eligible to be appointed.

6. Provisional Appointments: Provisional appointments will be made only in accordance with Section 670-X-9-3(3)(d)

of the rules of the Personnel Department, and in no circumstances will be used to avoid black eligibles or the other provisions of this Decree. ***LAST SENTENCE PENDING APPROVAL OF COURT.***

ARTICLE TEN
HIGHWAY DEPARTMENT JOBS AND CAREER PATHS

1. In-house jobs: The Highway Department will develop and use a designation of the merit system jobs which may fill each of the in-house job titles utilized by the Highway Department.

2. Career paths: The Highway Department will develop and disseminate to employees a written description of the in-house job titles and career paths available within the Highway Department and the merit system job classifications and Registers from which the jobs in each career path may be filled.

3. Manager or supervisor programs: Within 180 days of the effective date of the Decree, and thereafter on an annual basis, the Highway Department will —

(a) Conduct a supervisory management orientation program, open to all interested employees, for the purpose of explaining the management and supervisory positions in the Highway Department career paths and the duties and responsibilities of such jobs.

(b) Conduct a supervisory management update program to be attended by all managers and supervisors

for the purpose of reporting on the progress of the Highway Department pursuant to the Settlement Decree, to apprise them of ongoing and proposed Highway Department projects, and to provide training in new or updated techniques in management and supervision.

ARTICLE ELEVEN
GOALS

PENDING COURT APPROVAL, EXCEPT FOR PARAGRAPHS 11, 21 AND 22

* * *

11. The Highway Department will take affirmative steps to have eligible black employees of the Department receive assignments at rates proportional to their representation in the relevant job classifications to the better in-house job titles at the Highway Department. In the event that the plaintiffs conclude that the efforts of the Highway Department in this area are not adequate, they may petition the Court for further relief in this area during the pendency of this Decree.

* * *

21. Any Engineering Assistant I or II who is actively employed in either of such jobs as of the effective date of this Decree and who had at least two years service in either one or both of such job classifications as of October 4, 1989 will be reclassified as an Engineering Assistant III within 30 days of the effective date of this Decree and will be paid at the rate which would have now been applicable if they

had become an Engineering Assistant III on the fifth (5th) anniversary of their entrance into the Engineering Assistant I or II job classification, whichever occurred earliest.

22. In the event that minimum qualifications for engineering classifications are defined in terms of years of service in other classifications, and in the event that prior experience is scored according to periods of incumbency in other classifications, the following will apply:

(a) All periods after the 5th year of service as an EA I and/or EA II will be deemed to be service as an EA III.

(b) All years of service after the 8th year of service as an EA at any level will be deemed to be service as a CE I.

(c) All years of service after the 10th year of service as an EA at any level will be deemed to be service as a CE II.

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ARTICLE TWELVE
SPECIAL PROCEDURE FOR APPOINTMENT OF ENGINEERS

ENTIRE ARTICLE PENDING COURT APPROVAL

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ARTICLE THIRTEEN
ENGINEERING JOB CLASSES

1. Limit on the use of EIT status:

(a) On and after the effective date of the Consent Decree, EIT status and any associated tests will not be utilized as a prerequisite for the job of GCE.

(b) After the goals provided by the Consent Decree for the GCE job have been achieved, then in evaluating eligibles certified to it for the GCE job, the Highway Department may consider EIT status as a factor in the selection process but may not appoint a white applicant in preference to a black applicant based solely on EIT status.

(c) Personnel will not utilize the EIT for scoring, ranking or certifying applicants for the position of GCE.

2. GCE job:

(a) The position of GCE will not be reduced in status, pay or importance from what it has been in the past.

(b) The GCE job will continue to be used as the entry level job for the PCE line of progression.

(c) The GCE job will also be expanded to an advanced entry level position for the CE line of progression.

(d) The number of GCE's during the term of the Consent Decree will not be less than the average number per year of GCE's between January 1, 1983 and January 1, 1993.

3. State registration:

(a) Certification by the State Board of Registration as a Registered Professional Civil Engineer will continue to be a prerequisite for the PCE and GRE jobs. It will not be a prerequisite for any CE or GCE job.

(b) The PCE job will not be used excessively by the Highway Department in the assignment of employees to the in-house job titles which have been filled by both employees in the PCE job and in the CE job.

(c) The Highway Department will not make appointments from PCE Registers or use the PCE job as the source for assignments for in-house job titles for the purpose of avoiding compliance with any provision of this Decree.

(d) In the case of Highway employees who have taken but failed to pass the State Board examination for Registered Professional Civil Engineer or who are eligible to take such State Board examination, Highway will develop a special training program aimed at preparing them to take or retake the State Board examination.

4. Offers of reclassification of incumbent employees to GCE: ***PENDING COURT APPROVAL***:

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5. Offers of employment in the GCE job:

(a) The following persons (if they have Civil Engineering or Civil Engineering Technology degrees) will be offered employment in the GCE job or in the job they would now hold with the Highway Department in the absence of the EIT and associated requirements (including the recency of degree requirement), whichever is higher, with the following credited service dates:

	CREDITED SERVICE DATE
Alfedo Acoff	March 30, 1983
Peggy Vonsherrie Allen	March 30, 1983
Christopher Zaubuike	March 30, 1983
Jeffery W. Brown	March 30, 1983
Willie F. Franklin	March 30, 1983
Macon Hinton	March 30, 1983
Wayne M. Leonard	March 30, 1983
Ronald D. Newsome	March 30, 1983
Adenrele Odutola	March 30, 1983
Rickey Richardson	March 30, 1983

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(b) Up to a maximum of 10 persons, plus one replacement for each person named in Paragraph 5(a) who is not appointed for any reason, black persons (if they have Civil Engineering or Civil Engineering Technology degrees) will (subject to availability) be appointed to the GCE job or the job they would now hold with the Highway Department in the absence of the EIT and associated requirements (including the recency of degree requirement), whichever is higher, provided that they satisfy the following conditions:

(i) They applied during the period since the EIT requirement was adopted for the GCE job or they would have applied for the GCE job but for the EIT requirement, and

(ii) They were or would have been rejected because of not having EIT status, or other associated characteristics (including, but not limited to passing the FOE test and satisfying the recency of degree requirement) and

(iii) They had degrees in Civil Engineering and Civil Engineering Technology at the time they applied or would have applied, and

(iv) They would have been certified-out for GCE in the absence of their rejection for lack of EIT status or other associated characteristics as defined above.

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(c) The credited service date of such of the persons specified in Paragraph 5(b) above as accept such offers will be agreed to by the parties before notice of the offer of employment is given to them, subject to the following:

(i) No such credited service date shall be earlier than March 30, 1983.

(ii) The standard for determining such service dates will be the approximate date each such person would have been appointed in the absence of the EIT and associated requirements

(d) The maximum number of persons provided for by Paragraph 5(a) and Paragraph 5(b) together is 20.

(e) The State Personnel Department agrees to accept the appointment by the State Highway Department of such persons named or specified in Paragraphs 5(a) and 5(b) above as accept such offer, notwithstanding the inconsistency of such appointment (if any) with the Alabama Merit System Act.

(f) ***PENDING COURT APPROVAL***:

6. Jobs for appointments pursuant to Paragraph 5:

The job or jobs which the persons to be appointed pursuant to Paragraph 5 will be offered will be agreed to by the parties before notice of the offer of employment is given to them, subject to the following:

(a) For such persons as have a registration with the Alabama State Board of Registration as a Registered Professional Civil Engineer as of the effective date of this Decree, the job to be offered will not be lower than GRE or higher than PCE-2.

(b) For such persons as do not have such registration, the job to be offered will not be lower than GCE or higher than CE-5.

7. Mechanics for the Paragraph 5 offers:

(a) Within 45 days following the effective date of this Decree and agreement on the job or jobs to be offered, the Highway Department will offer appointments to each of the persons named in Paragraph 5(a) above.

(b) The offers of employment provided for herein will be made by United States mail, addressed to the last known addresses of the persons listed in Paragraph 5(a) above (a) as set forth in the records of the State Personnel Department or (b) as provided to the State Highway Department and the State Personnel Department by the attorneys for the plaintiffs based on any search or research they may wish to engage in to locate such persons provided any address or address is to be provided to the State Highway Department and the State Personnel Department within forty (40) days following the effective date of this Settlement Decree and agreement on the job or jobs to be offered. There will be no responsibility on any defendant to locate or to attempt to locate any of such persons.

(c) Such offers of appointment will include a designation for the use of such persons in accepting or declining the offers. There will be no option other than the options of accepting the offer or declining the offer. The offers must be accepted within such thirty (30) days following the mailing of the offers. Anyone who does not respond to the offer within such 30 day period will be deemed to have declined the offer.

(d) The offers of appointments provided for herein will remain open for a period of thirty (30) days following the mailing of the offers. Any and all offers of employment not accepted in writing by the offeree shall expire and have no further force or effect following such thirty (30) day period.

(e) Such of the persons named in Paragraph 5(a) of this Article as accept the offers of employment and are employed at the State Highway Department pursuant to Paragraph 5 of this Article will be credited with employment date service as of March 30, 1983 for purposes of their starting salary level in the job. It is the intention of this provision that such of the persons named in Paragraph 5(a) as are appointed pursuant to Paragraph 5 of this Article of the Settlement Decree will have their starting salary upon such employment equal to the average of the current salaries of the persons in the Graduate Civil Engineer job who started in such job on or about March 30, 1983.

(f) The employment of any of such persons named in Paragraph 5(a) above shall not result in the

displacement of anyone from any job, position, assignment, location, or si[illegible] and shall not result in the displacement of anyone from any section or bureau or division or district or office.

8. Notice to recruitment sources: The Highway Department will notify all recruitment sources, including colleges with Civil Engineering and Civil Engineering Technology programs at which the Highway Department recruits for Engineers, that EIT status, associated tests, and the recency of degree requirement has been discontinued as a prerequisite for the GCE job.

9. Newspaper notice: The Highway Department will place a notice advising that EIT status and associated characteristics, including the FOE test and the recency of degree requirement, has been discontinued as a prerequisite for the GCE job in newspapers of general circulation and special circulation in black communities and will otherwise adequately publicize such changes in the electronic media in the following cities:

— Montgomery

— Birmingham

— Mobile

— Tuscaloosa

— Auburn

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— Huntsville

— Dothan

— Tri-Cities Area

— Gadsden

— Anniston

— Alexander City

— Troy

— Grove Hill

Such notices and publicity shall invite black engineers to apply for employment with the SHD through the SPD. Notices and publicity in the print media shall consist at, a minimum, of quarter 1/8 page advertisements designed to reach the maximum number of readers. Notices and publicity in the electronic media will be designed and placed in the most advantageous manner for achieving the attention of the public.

10. Notice to applicants for GCE rejected because of the EIT requirement:

(a) To the extent it is able to do so, the Personnel Department will provide to the Highway Department the names and last known addresses for all black persons with degrees in Civil Engineering and Civil Engineering

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Technology who applied for the GCE job and were rejected because of not having EIT status or any associated characteristics as defined above. The Highway Department shall make reasonable efforts to identify the names and last known addresses of all black persons with degrees in Civil Engineering and Civil Engineering Technology from the colleges and universities which it will recruit under the terms of this Consent Decree.

(b) The Highway Department will in turn give notice to such persons by certified mail, addressed to them at their last known address, advising them of the discontinuance of EIT status and associated characteristics as a prerequisite for the GCE job and enclosing a blank application form so they can if they wish reapply with Personnel for the GCE job.

(c) Those who reapply and are certified-out by the Personnel Department to the Highway Department for the GCE job will be offered employment by the Highway Department in the GCE job, assuming they satisfy the qualification standards of the job and, if they did not apply for the GCE job in the past, can show a reasonable probability that they would have applied in the absence of the EIT or associated requirements, including, but not limited to, the FOE exam and the recency of degree requirement.

(d) Those not offered employment and hired in accordance with Paragraph (c) above would remain on the register under the conditions of the Register Purging provisions above.

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11. Age Restrictions: The defendants will not utilize any criteria or selection procedure in relation to black applicants which has the purpose or effect of preferring scoring, ranking or restricting eligibility of black applicants because of the date of their education, their age or any other item related to time or age which may perpetuate past patterns of underutilization of black applicants.

ARTICLE FOURTEEN
SELECTION PROCEDURES

1. No new or more demanding standards:

(a) Black applicants and employees will not be subjected to employment criteria or procedures for hiring or promotion that are more difficult or demanding than those applied to white employees in the period since January 1, 1979 unless such more difficult or demanding criteria or procedure is shown by Highway to satisfy and be valid within the meaning of the Uniform Guidelines on Employee Selection Procedures.

(b) This does not mean that the job performance of black employees could not be evaluated by the revised Performance Appraisal procedure in effect or any future revision.

2. Assignment of duties:

(a) To the extent practicable, the duties and responsibilities of higher classified jobs will be assigned on a proportionately equal basis to black employees compared with white employees in the same lower classified jobs.

(b) The Highway Department will to the extent practicable not assign duties in such a way that any employee will gain an advantage in promotions, including reclassification, over other employees in the same classification.

3. Job duties which better prepare employees:

(a) Within 90 days following the effective date of this Settlement Decree, the Highway Department and the Personnel Department will identify the job assignments or duties within a job classification which would better prepare an employee for examination or promotion (including reclassification) than other assignments or duties within such classification.

(b) The assignments and duties identified will include, but not be limited to, any assignment or duty which would receive a greater value or number of points in a T & E rating, a classification or pay review, or in selection from a COE.

(c) For each assignment or duty so identified, the Highway Department will, to the extent practicable, develop a means for assuring that employees on the job are periodically rotated into such assignments and duties and that black employees are assigned to such duties and assignments at rates proportional to their representation in the job classification.

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ARTICLE FIFTEEN
RECLASSIFICATION AND REALLOCATION

1. Reclassification program: Following the effective date of this Decree, the following steps will be taken:

(a) All employees then working for the Highway Department in the classified service will be provided with a Form 40 on which they may list the job duties which they are performing and the percentage of time spent on each such job duty. Such filled-out Form 40's will be subject to review and approval or revision by such employee's supervisor or supervisors. Any disagreement will be resolved by a job study analysis by the Personnel Department, subject to challenge by plaintiffs' counsel.

(b) To the extent that such completed Form 40's establish that the subject employee is spending a majority of their working time in the performance of the duties and responsibilities of a higher job classification, or is spending an amount of time on such duties and responsibilities substantially equal to that of a majority of incumbents in such higher job classification, the Highway Department will request the Personnel Department to reclassify such employee to the higher job which is most appropriate for the duties and responsibilities on which the employee is spending a majority of his or her working time, and the Personnel Department will approve such request if such request is consistent with the findings of Personnel's classification review and its classification plan.

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(c) Laborers who are working at the Highway may utilize the procedure described in Paragraph 1(a) above to obtain permanent status in the appropriate merit system classification after completion of one year of satisfactory service.

(d) All Laborers who are actively employed and have successfully performed the position of Laborer for one year as of the effective date of this Decree shall be reclassified to the HMT or EA position which is most similar to the duties they have performed as a Laborer on a regular basis.

(e) In the future, all Laborers who have successfully performed the position of Laborer for one year shall be reclassified to the HMT or EA position which is most similar to the duties they have performed as a Laborer on a regular basis.

(f) Nothing contained in this Paragraph 1 will apply to seasonal Laborers.

2. *Limit on filling jobs by reallocation*: A permanent opening in a classification may not be filled by reallocation when a black eligible is on the register for the class to which the position is being reallocated and such black eligible is (a) ranked higher or tied on the Register with the person to be reallocated or (b) would appear on a COE form from that Register if the person to be reallocated were ranked first on the COE.

3. *Multi-Grade Jobs*: The following steps will be taken by the defendants:

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(a) A job classification study will be conducted by the State Personnel Department encompassing the job classifications at Highway in a multi-grade series. Such study will commence with the following multi-grade jobs:

— Engineering Assistants

— Civil Engineers

— Professional Civil Engineers

— Highway Maintenance Technicians and Highway Maintenance Superintendent

— Right-of-Way Specialists

— Project Cost Auditors

(b) In the event such job classification study discloses that existing distinctions in the levels of multi-grade jobs do not reflect actual differences in duties, responsibilities, or qualifications, the jobs will be collapsed or restructured so that (i) they will reflect the actual distinctions, if any, shown by the study and (ii) are capable of being administered and utilized so that only persons occupying that classification perform the duties associated with it on a regular or non-emergency basis.

(c) Any restructuring of multi-grade jobs will likely involve reducing the number of grades and broadening

the pay ranges within the newly defined classification[s]. Such restructuring shall be implemented in a way that the opportunities for black employees to advance, and for the defendants to achieve the goals and purposes of this Decree, are enhanced and not diminished.

(d) In the event that the study results in the consolidation of classes (e.g., HMT-1 and HMT-2), all persons will be assigned to pay ranges appropriate to their years of service, provided that black employees shall not be downgraded or have a reduction in pay as a result of the reclassification study unless it is demonstrated by the Highway Department that they have not performed after being given the opportunity to do so, and are not capable of performing with reasonable training, the duties and responsibilities of the job classification to which they are assigned.

4. Duties within the job description: The Highway Department will monitor the duties and responsibilities performed by employees with the goal of assuring to the extent practicable that at least 90% of the duties and responsibilities performed by employees on a regular or non-emergency basis are within the job description for job they are holding.

ARTICLE SIXTEEN
TRAINING

1. Temporary special training program: During the first calendar year following the effective date of the Settlement Decree, the Highway Department will develop

and provide to all black employees a temporary special affirmative action training program with the goal of assisting such employees in progressing in career paths within the Highway Department. Such program will be provided again during the years 1997 and 1999.

2. *Regular Training Courses*: During the term of this Settlement Decree, the State Highway Department will offer training courses to employees subject to and in accordance with the provisions of the following subsections:

(a) The employees to whom such training courses will be offered will be all Highway Department employees who are working, during the calendar year in which the courses are offered, on a merit system job and have worked at least 540 hours of work during such year or the prior year on such job; provided, however, that Laborers will be treated the same as all HMT's for purposes of eligibility for such training courses.

(b) The training courses to be offered to such employees are set forth in the attached Appendix __ to this Settlement Decree and a course or courses designed to clarify and update black employees on the procedures to be followed and qualifications, training, and experience to be credited in filling higher classified jobs within the Highway Department.

(c) The Highway Department will monitor the enrollment of employees taking training courses in order to ensure to the extent practicable that interested black employees are receiving their fair share of participation in such training courses.

(d) The training courses to be offered pursuant to the Training section of the Settlement Decree will be started within 120 days after the effective date of the Settlement Decree and thereafter will be offered on an annual basis.

3. The training courses provided for by this Article will be offered to the employees eligible therefore, with such employees having the option to accept or decline the training courses. Offers and declinations of training opportunities shall be documented in writing and signed by the affected employee.

ARTICLE SEVENTEEN
POLICY AGAINST RACIAL HARASSMENT

1. Policy: The Policy Against Racial Harassment promulgated by the Highway Director in October 1992 will remain in effect. Such policy will be disseminated to employees by being posted on bulletin boards customarily used for notices to employees.

2. Training: The Highway Department will develop and implement a training program to educate all employees on the laws of the United States regarding EEO and the policy of the Highway Department against racial harassment. Such training will include a training course in the policy against racial harassment modelled on the Highway Department's training course in the policy against sexual harassment.

Appendix D

ARTICLE EIGHTEEN
RELATIVES

1. No preference will be given to any known relative of any current State Highway Department employee.

2. It is recognized that while the employment of relatives is not in and of itself unlawful, the giving of preference to relatives can under certain circumstances constitute a violation of Title VII of the Civil Rights Act. Accordingly, the State Highway Department shall monitor and to the extent practicable identify persons who are related to current employees of the State Highway Department to ensure that no person is shown preference in hiring or promotion within State Highway Department by reason of being a known relative of a current employee of the State Highway Department. In those cases where a relative of an employee of the State Highway Department is employed or promoted, the State Highway Department will maintain such records as are necessary to document the basis for the non-hiring or non-promotion of any black applicants who are equally qualified for the position or the promotion.

ARTICLE NINETEEN
GENERAL

1. *Frazer Ballard*: Defendants remain bound by the injunctive and declaratory relief entered in *U.S. v. Frazer* (now *Ballard*).

2. *EEO Monitor*. Within 90 days following the effective date of the Settlement Decree, the Highway Department will

assign a qualified employee answerable directly to the Highway Director and stationed in Montgomery, whose primary responsibilities will consist of (a) monitoring compliance with the terms of the Settlement Decree, and (b) assisting both the Highway Department and the Personnel Department in carrying out the terms of the Settlement Decree. The person to be assigned as the EEO Monitor pursuant to this Paragraph 2 is Ron Green. In the event Mr. Green is unable or unavailable to continue to serve in this position at any time during the term of this Decree, the Highway Department will consult with the plaintiffs' attorney concerning his replacement.

3. EEO Program: The Highway Department's Equal Employment Opportunity Program will be enhanced and administered in a manner agreed between the parties.

4. Reports: The Highway Department and the Personnel Department will make quarterly reports on their efforts to comply with the Settlement Decree in the format set forth in the attached Appendix __. Such reports will be filed with the Court with a copy to plaintiffs' counsel. Such reports will be filed throughout the duration of this Decree to December 31, 2000, provided that if all or any part of this Decree is extended, the plaintiffs will have the right to petition the Court to extend the reports.

5. Records: The Highway Department and the Personnel Department will permanently retain all records concerning the implementation of the Consent Decree for a period of 5 years following the expiration date of the Consent Decree. Such records would be available to plaintiffs' counsel for inspection and copying for a period of 5 years following the expiration date of the Settlement Decree.

Appendix D

6. Monitoring:

(a) Plaintiffs' counsel will be entitled to contact and request information from the Highway Department and Personnel Department during the term of the Settlement Decree to monitor their compliance with the terms of the Decree, and the Defendants will comply with such requests to the extent reasonable. All requests relating to the development and implementation of policies, procedures, systems, rules, appointments, studies shall be deemed reasonable. Such requests are to be in writing with copies thereof to counsel for the defendants. The plaintiffs' counsel shall have the right to review the efforts at compliance and implementation of this Decree and shall be furnished with the information necessary to such review upon request. The defendants will consider in good faith the comments of the plaintiffs' counsel.

(b) Any provision of this Decree which provides for a right of plaintiffs' counsel to review and comment on efforts at compliance or implementation shall be subject to challenge by the plaintiffs'.

(c) The parties will have the right to seek to enforce the provisions of this Decree by filing motions with the Court. The provisions of this Decree, and the issues challenged in the case, have been premised upon the existence of the prior remedies ordered in the *Frazer/Ballard* case and, to the extent that any future acts or omissions violate the remedies ordered in *Frazer/Ballard*, the plaintiffs will be entitled to enforce such

remedies in this case in the same way that they are entitled to enforce the remedies of any other provision of this Decree.

(d) It is the intent and purpose of this Decree to undo the effects of the past practices which have been the subject of this case and Decree and to prevent further practices which may perpetuate such efforts or otherwise discriminate against the plaintiffs or the class they represent. To the extent that this Decree fails to achieve the intent and purpose for which it has been entered, the parties may seek further relief from the Court.

(e) Plaintiffs' counsel will be entitled to reasonable costs and fees for monitoring compliance with the Settlement Decree, including any expert witness fees. Plaintiffs' counsel will provide documentation of the number of hours spent, the functions performed, and the costs incurred on a quarterly basis. Subject only to the accuracy of such documentation and the reasonableness of the amount requested, the requested amount would be paid within 30 days of submission. For routine monitoring, but not for the resolution of disputes, the maximum caps will be $10,000 per year for attorneys' fees, expenses and costs and $5,000 per year for expert witness fees, expenses, and costs. Amounts of fees within the limits of such caps will not be contestable by the defendants. The term "costs" will include normal billable expenses, including expert witness fees, as provided under the Civil Rights Act of 1991. Disputes will be resolved by the Court.

(f) The plaintiffs' attorney will have the right to petition the Court to extend this Paragraph 6 and any or all sub-paragraphs thereof beyond December 31, 2000.

7. *Complaint procedure*: Within 180 days of the effective date of this Decree, the Highway Department will develop and implement an enhanced complaint procedure which assures that all discrimination complaints are processed without fear and reprisal within established time limits and that appropriate action is taken following decisions. Such procedure will be submitted to plaintiffs' counsel for review and comment at least 30 days prior to its implementation.

8. No reference in this Decree to existing job classes or job groupings will be construed to restrict Defendants' ability to modify or abolish such classes or groupings, provided that the plaintiffs will be given prior notice and the opportunity to object and to seek Court review in this action prior to implementation of such changes.

9. In developing validation efforts directed to minimum qualifications or examinations, and in developing revised examination announcements, Personnel will (a) document its efforts in writing, (b) consult with the attorney for the plaintiff class regarding the selection of its psychologists and (c) consult with the attorney for the plaintiff class and any psychologist or other expert designated by such attorney for such purposes. Prior to implementing the results of such efforts, Personnel will make the documentation of its projects available for review and comment by plaintiffs' attorney and consultants.

Appendix D

10. Duration: The duration of the Consent Decree is December 31, 2000. The Court retains jurisdiction to decide any and all questions or disputes which arise under this Decree during such period or any extension period. The plaintiffs will have the right to seek extension of the duration of the Consent Decree.

11. Notice of the proposed settlement: The provisions of the Civil Rights Act of 1991 will govern with respect to notice and objections and hearing concerning the Settlement Decree.

12. Effective date: The phrase "the effective date of the Settlement Decree" means the date 35 days following the final approval of the Settlement Decree by the Court.

13. Except to the extent expressly provided otherwise, all of the terms and provisions of this Decree shall operate prospectively only beginning with the effective date of the Decree.

14. ***PENDING COURT APPROVAL***:

15. ***PENDING COURT APPROVAL***:

16. Subject to the provisions of this Decree permitting or requiring further proceedings, including but not limited to, Articles 20 and 21, this Decree constitutes full and complete relief on all claims, causes of action, and allegations which have been asserted in this action.

17. All parties agree and stipulate that there will be no appeal from this Consent Decree or from any ruling, order,

or decision entered by the Court in the case relating to any issue or subject encompassed within the terms of this Decree. Nothing herein shall prohibit the non-class employees or any other person not a party to this Decree from having the right to appeal any interpretation, ruling, decision or order.

18. The State Highway Department and the State Personnel Department will continue to comply with all laws and regulations applicable to equal opportunity in employment.

19. Nothing in this Consent Decree shall be construed to permit the defendants to violate any law or regulations. In particular, the State Highway Department and the State Personnel Department remain obligated to follow Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, all applicable Federal regulations, and all applicable Court orders with respect to all employment practices except as otherwise set forth hereinabove.

ARTICLE TWENTY
FURTHER PROCEEDINGS REGARDING CLASS MEMBERS

1. Further negotiations and proceedings are required to resolve the claims for monetary and non-monetary remedies for individual members of the class (including the named plaintiffs and intervenors), provided however, that this Decree does not in and of itself entitled any such class member to such remedies. Such claims shall be resolved first by settlement negotiations and then, to the extent not resolved by settlement negotiations, by the Court.

2. The parties will make all reasonable efforts to resolve all such claims of the members of the class (including the named plaintiffs and intervenors) according to a schedule to be mutually agreed upon within 10 days after preliminary approval of this Decree by the Court or, in the event the parties cannot mutually agree on such schedule within such 10 day period, the Court will enter an Order embodying a schedule. Regardless of whether the schedule is mutually agreed upon by the parties or embodied in an Order entered by the Court, such schedule shall contain specific deadlines for the exchange of information and for offers and counter-offers to enable settlement negotiations on such claims to take place within 90 days after the effective date of this Consent Decree and, in the event such settlement cannot be achieved, for trial on that phase of the case to commence no later than 180 days after the effective date of this Decree.

3. Such schedule shall be presented to the Court for approval or modification, and once finalized shall be entered as an Order of the Court. In the absence of agreement on such schedule within 10 days of the preliminary approval of this Decree, the Court will enter its own schedule aimed at settlement negotiations taking place within 90 days after the effective date of this Decree and scheduling that phase of the trial of this case to commence no later than 180 days after the effective date of this Decree.

ARTICLE TWENTY-ONE
ATTORNEYS' FEES

1. The parties will endeavor to reach agreement on the amount of attorneys' fees, costs, and expenses for services and expenses up to the then current date.

2. If the parties have been unable to agree upon the amount of interim fees and expenses before the effective date of this Decree, the plaintiffs will submit their claim for fees to the defendants within three days of the effective date of this Decree and, within twenty-one days (21) thereafter, the defendants shall in good faith stipulate to the amount of such fees and expenses which they would urge the District Court to find to be reasonable and shall pay such uncontested sum to the plaintiffs' attorneys within thirty (30) days of the effective date of this Decree or at such other time as is mutually agreed to. As to any remaining sums claimed by the plaintiffs' counsel for fees and expenses, the defendants will, within twenty-one (21) days of receipt of plaintiffs' claim for fees, identify the hours they contest as unreasonable or otherwise not awardable with a short statement of the basis for each such contention, identify the hourly rate for each attorney representing the plaintiff which it would stipulate to be reasonable and urge the District Court to adopt, identify any other contentions which it would make regarding the amount of fee which should be awarded to each attorney appearing on behalf of the plaintiffs and identify any expense items which it contests as unreasonable or non-reimbursable with a short statement of the basis for each such contention. In the event that the fees and expenses must be determined by the Court, the parties stipulate that the proposed Consent Decree, if adopted by the Court, constitutes full relief on all claims asserted in this action and that the plaintiffs are the prevailing party as to all issues and claims in this lawsuit. In the event that the Court must determine the amount of fees and expenses, the parties will in good faith attempt to stipulate to the following items: (a) the reasonable hourly rate which should be paid for the services of each attorney

representing the plaintiffs; (b) the reasonable number of hours expended by each such attorney on behalf of the plaintiffs; (c) the reasonable amount of expenses incurred on behalf of the plaintiffs that should be reimbursed by the defendants. The class counsel (the law firm of Gordon, Silberman, Wiggins & Childs) shall be entitled to reasonable fees and expenses for work done after the preliminary approval of the Decree on behalf of the plaintiffs and the plaintiff class. If agreement cannot be reached, the amount of attorneys' fees and expenses will be resolved by the Court as soon as practicable (from the Court's standpoint). The Civil Rights Act of 1991 will govern with respect to allowable costs and expenses.

DONE and ORDERED this the 16th day of March, 1994.

s/ Myron H. Thompson
MYRON H. THOMPSON
CHIEF JUDGE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
ALABAMA

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION OF CIVIL CONTEMPT AGAINST THE ALABAMA DEPARTMENT OF TRANSPORTATION AND THE ALABAMA STATE PERSONNEL DEPARTMENT DATED AND FILED JANUARY 31, 2000

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

ORDER OF CIVIL CONTEMPT AGAINST THE
ALABAMA DEPARTMENT OF TRANSPORTATION
AND THE ALABAMA STATE PERSONNEL
DEPARTMENT

In 1994, this longstanding lawsuit — in which the plaintiffs (who represent African-American employees and applicants) charged the defendants (the Alabama Department of Transportation, the Alabama State Personnel Department,

and their officials) with racial discrimination in employment and in which the Adams intervenors (who represent non-black employees) were allowed restricted intervention — resulted in a partial consent decree (consent decree I) settling what all parties agreed were race-neutral class-wide issues.[1] This litigation is again before the court, this time on the following three motions: (1) the plaintiffs' motion for civil contempt, filed February 13, 1997;[2] (2) the plaintiffs' motion for further relief, filed February 13, 1997;[3] and (3) the Adams intervenors' motion for contempt enforcement through race-neutral means, filed September 20, 1999.[4] The court also has before it two other important filings: (1) the defendants' stipulation to noncompliance with consent decree I, filed August 13, 1999;[5] and (2) the parties' agreement to remedies for contempt, filed December 17, 1999.[6] As will be explained below, the court now finds that the defendants are in civil contempt of consent decree I and, with this finding, fashions appropriate relief.

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1. *See Reynolds v. Alabama Dep't of Transp.*, 1994 WL 899259 (M.D. Ala. Mar. 16, 1994) (Doc. no. 553).

2. Doc. no. 1542.

3. Doc. no. 1543.

4. Doc. no. 4167.

5. Doc. no. 4147.

6. Doc. no. 4247.

Appendix E

I.

THE PLAINTIFFS' MOTIONS FOR CIVIL CONTEMPT AND FOR FURTHER RELIEF

(1) After the plaintiffs filed their February 1997 motions for civil contempt and for further relief, the defendants were ordered to show cause why the motions should not be granted,[7] and the defendants responded on March 7, 1997.[8]

(2) After substantial discovery in the period from March to July 1997, the plaintiffs' motions were tried to the court for seven days, from July 7 to 14, 1997, before being taken under submission.

(3) During 1998, additional evidence addressing the defendants' contempt on related aspects of consent decree I was heard on the plaintiffs' second and third civil contempt motions, which had been filed on April 30, 1998,[9] and June 16, 1998,[10] resulting in the civil-contempt order of July 8,

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7. *See* order entered February 18, 1997 (Doc. no. 1552).

8. Doc. no. 1631. Initially, there was some confusion over whether the Personnel Department was charged with civil contempt in the plaintiffs' 1977 motions. By order entered on June 24, 1997 (Doc. no. 1952), the court held that the department was charged in the motions.

9. Doc. no. 2624.

10. Doc. no. 2825.

1998, *Reynolds v. Alabama Department of Transportation*, 10 F. Supp.2d 1263 (M.D. Ala. 1998),[11] and the court's order of September 23, 1998.[12]

(4) Concerned that the evidence developed at the hearings on the plaintiffs' January 1997 motions needed to be updated, the court ordered a supplemental evidentiary hearing for March 2, 1999.[13]

THE DEFENDANTS' STIPULATION OF NON-COMPLIANCE AND THE ADAMS INTERVENORS' MOTION FOR CONTEMPT

(5) Further discovery and exchange of information eventually resulted in the defendants stipulating to certain facts and to non-compliance with consent decree I on August 13, 1999.[14] The plaintiffs and defendants also represented that still further stipulations or, in their absence, further evidence would be forthcoming prior to or during the supplemental evidentiary hearing on the plaintiffs' motion for contempt.

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11. Doc. no. 2954.

12. Doc. no. 3163.

13. *See* order entered December 14, 1998 (Doc. no. 3379).

14. Doc. no. 4147. In this order, the court has attempted to summarize the defendants' stipulation. To the extent the court's summary of the stipulation differs from the stipulation itself, the language of the stipulation still controls in this litigation.

(6) The Adams intervenors subsequently filed a motion to hold the defendants in contempt of several discrete provisions of four articles of consent decree I: article II, ¶ 2(a-b), article III, ¶ 4(a-b), article IV, and article XV, ¶ 1 and ¶ 3(d).[15] The court issued a show-cause order on September 24, 1999,[16] to which the defendants filed their response on October 1, 1999,[17] and the plaintiffs filed a response that same day.[18]

(7) After its original setting on March 2, 1999, the court reset the supplemental evidentiary hearing on the issue of the defendants' contempt on a number of occasions based on the plaintiffs' and defendants' representations that they were preparing stipulations that would update the evidentiary record, in whole or in part, without need of any additional evidentiary hearing.

THE PARTIES' AGREEMENT FOR REMEDIES OF CONTEMPT

Opening Provisions

(8) On December 17, 1999, the plaintiffs, the defendants, and the Adams intervenors submitted an

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15. *See* motion for contempt enforcement through race-neutral means, filed September 20, 1999 (Doc. no. 4167).

16. Doc. no. 4177.

17. Doc. no. 4189.

18. Doc. no. 4190.

agreement on remedies for contempt.[19] The parties agree that the defendants should be held in civil contempt of court for non-compliance with consent decree I and the court's orders and injunctions related to its enforcement until such time as they have affirmatively demonstrated that they have achieved full compliance with such decree, orders, and injunctions.

(9) The remedies agreement addresses and resolves the defendants' non-compliance with and contempt of consent decree I and orders and injunctions enforcing the decree. In other words, the specific allegations of contempt asserted by both the plaintiffs and the Adams intervenors are resolved except as expressly otherwise set forth in the agreement. The remedies agreement also addresses and resolves the issue of what coercive remedies and sanctions are appropriate for such non-compliance; however, it does not resolve any other remedial issues regarding the defendants' contempt or the pending motions, including, but not limited to, compensatory relief.

(10) The parties agree that because the decree was entered under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C.A. §§ 1981a, 2000e through 2000e-17), the Civil Rights Act of 1866, as amended (42 U.S.C.A.

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19. Doc. no. 4247. In this order, the court has recited from and attempted to summarize the remedies agreement. To the extent the court's view of the agreement differs from the agreement itself, the language of the agreement still controls in this litigation; and the fact that a provision or reservation in the remedies agreement is not mentioned in this order does not mean that the provision and reservation are not still operative, or, to put it another way, the provision and reservation are still operative.

§ 1981), and the fourteenth amendment to the United States Constitution as enforced through Civil Rights Act of 1871, as amended (42 U.S.C.A. § 1983), this court is authorized under 28 U.S.C.A. § 1331, 42 U.S.C.A. § 1343, and Title VII to enter the relief necessary to coerce compliance and compensate for injuries caused by non-compliance, and venue is proper in this court.

(11) Pursuant to the remedies agreement, the defendants must, by certain dates, demonstrate full compliance with each article of consent decree I. The parties agree that certain agreed-upon coercive sanctions are to begin automatically on the date provided in the absence of a stipulation or order of the court establishing the defendants' full compliance.

(12) Under the remedies agreement, nothing in it extends or should be construed to extend the time for complying with consent decree I or any orders or injunctions relating to the decree; nothing in the agreement should be construed to modify, alter, or amend the terms of consent decree I or any other order or injunction previously entered by the court; and nothing in the agreement excuses or should be construed to excuse full compliance with consent decree I or any other order or injunction.

(13) The plaintiffs and the defendants stipulated that the defendants have not yet fully complied with consent decree I, and they consent to entry of an order finding the defendants in contempt of the decree on the basis of the stipulations of non-compliance and fact filed August 13, 1999 (in particular, the defendants' admissions as set forth in stipulations 1-6, 19-23, 30-36, 39- 40, 75-78, 90-94, 96-97,

179-181), the court's prior orders, findings and declaratory judgments regarding compliance, or lack thereof, with consent decree I, the evidence presented at trials and hearings in this case since the effective date of consent decree I, and the record of the case as a whole at any time since the effective date of consent decree I. The Adams intervenors do not join in the plaintiffs and defendants' stipulations, and they decline to join in the plaintiffs' and defendants' agreement concerning this evidentiary basis. They also do not waive their contention that those remedies not set forth in the remedies agreement and which affect the employment interests of the intervenor class can only be entered upon consent or following full evidentiary proceedings.

Extension of Consent Decree I

(14) The plaintiffs and defendants agree that the term of consent decree I, in its entirety, should be extended until December 31, 2004. The plaintiffs and defendants further agree that the provisions of consent decree I affecting the recruitment and selection requirements of the decree — specifically article I, article III (¶¶ 2, 3, and 12), articles VI through X, article XI (¶¶ 11 and 21), article XIII (¶¶ 1(a) and (c), 2, 3(d), and 11), article XIV, and article XIX, (¶¶ 1-5, 6(a-d), and 7) — should be extended until December 31, 2006, with the special affirmative action training of article XVI, ¶ 1, to be repeated in 2002 and 2004. The plaintiffs and the defendants further agree that, prior to expiration of the term provided, the parties may seek further extension of any provision for which the defendants are not in full compliance. Notwithstanding the foregoing provision, the plaintiffs also retain the right to seek extension of the duration

of all or part of the consent decree I pursuant to the provisions of article 19, ¶ 10 of the decree. The plaintiffs also reserve the right to seek to restore the full amount of time that each provision of consent decree I was intended to operate after the initial compliance as a remedy for the defendants' contempt. The defendants reserve the right to oppose any such further extension.

(15) The Adams intervenors object to the foregoing extensions of consent decree I. The intervenors encourage in alternative that this court extend the decree for a period of only two years, to expire on December 31, 2002. In a hearing held December 21, 1999, the intervenors conceded that it was unlikely that the defendants would be able to achieve full compliance with all terms of consent decree I by that date; they suggested that this court should at that time simply extend the decree for another small discrete term, then extend that term again if necessary, and so on.

(16) Based on the evidence presented so far in this litigation, the court rejects the Adams intervenors' proposed alternative and concludes, instead and independently, that the decree should be extended as suggested by the plaintiffs and the defendants.[20] This court has repeatedly made clear that "[a] court's end purpose in institutional litigation, such as this, is to remedy the violation and then to restore to local or state authorities complete control of the institution

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20. By the word independent, the court means that it has viewed the plaintiffs and the defendants' stipulation for extension as merely a suggestion rather than a stipulation, and the court has therefore reached its own conclusion for extension based on the evidence presented.

operating in compliance with federal law." *Sims v. Montgomery County Comm'n*, 890 F. Supp. 1520, 1534-35 (M.D. Ala. 1995) (Thompson, J.) (citing *Missouri v. Jenkins*, 515 U.S. 70, 97-98, 115 S. Ct. 2038, 2054 (1995); *Freeman v. Pitts*, 503 U.S. 467, 489, 112 S. Ct. 1430, 1445 (1992)), *aff'd*, 119 F.3d 9 (11th Cir. 1997) (table). To set an unrealistic date for compliance and for the termination of litigation would not only be meaningless, it would trivialize the concept of a compliance date, with the result that there would, in effect, be no real compliance date. The court believes instead that it should set a realistic date for compliance, with the defendants expected to meet that date — no ifs, ands, or buts allowed. Both the plaintiffs and the defendants are entitled to certainty; they should not have to waste their time and resources on unnecessary litigation over deadlines that cannot be met. Moreover, one of the principal ways that a defendant subject to longstanding court supervision may prove its entitlement to release is by establishing an evidentiary record of compliance with court orders for a period of time. *See Freeman v. Pitts*, 503 U.S. at 491, 112 S. Ct. at 1446 (stating that courts, in deciding whether to release a school system from its supervision, "should give particular attention to the school system's record of compliance" because that school system "is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations.") It would therefore be against such defendant's interest for the court to set a compliance deadline that everyone knows cannot be met, for the court would, in effect, be setting the defendant up for defeat and thereby saddling the defendant with an evidentiary record of non-compliance.

Appendix E

Coercive Sanctions for Contempt

(17) The defendants agree to demonstrate affirmatively their full compliance with each provision of consent decree I by the deadlines agreed upon by the parties. If such affirmative demonstration, as confirmed by either a stipulation of the parties or order of the court, has not occurred prior to the deadlines for automatic sanctions agreed upon, then the following sanctions will commence on each such deadline and continue until such time as the court determines that the defendants have achieved full compliance with the subject article of consent decree I and related orders and injunctions. As to each article for which one of the deadlines has not been met, the following sanctions apply:

(a) On the first day following the expiration of the deadline date, and on each subsequent day until full compliance is stipulated by the parties or found to have been achieved by the court, defendants are to pay the sum of $ 500.

(b) Should the defendants' non-compliance continue for more than 30 days following the deadline date, beginning on the 31st day, and on each subsequent day until full compliance is stipulated by the parties or found to have been achieved by the court, the defendants are to pay the sum of $ 1,000.

(c) Should the defendants' non-compliance continue for more than 60 days following the deadline date, beginning on the 61st first day, and

on each subsequent day until full compliance is stipulated by the parties or found to have been achieved by the court, the defendants are to pay the sum of $ 1,500.

(d) Should the defendants' non-compliance continue for more than 90 days following the deadline date, the plaintiffs should notify the court, and the court is to set an emergency hearing to determine appropriate additional sanctions and remedies for continued non-compliance on an expedited basis.

(e) These sanctions apply, separately and severally, to each article of consent decree I.

(f) If the plaintiffs or the Adams intervenors believe at any time during the period prior to any deadline for fines to commence that the defendants are not making sufficient progress towards achieving full compliance with any provision of consent decree I, they may petition the court to enter such sanctions as are necessary to coerce such progress or compliance, including, but not limited to, commencing payment of the agreed-upon fines set forth above prior to the deadlines established below, and the court will treat such petition as an emergency motion by causing its hearing and determination to be expedited.

(g) The foregoing sums should be paid into the registry of the Court on a weekly basis.

(h) The defendants are required to comply with the deadlines and must affirmatively demonstrate such compliance in order to avoid payment of the sanctions set forth above.

Mediation

(18) The parties agree that, prior to the arrival of any deadline, if the defendants believe they have complied with the required actions, the defendants should timely solicit agreement from the plaintiffs and the Adams intervenors that the defendants are in compliance, in sufficient time prior to such deadline to allow the plaintiffs and the intervenors a reasonable opportunity to review the defendants' report and determine whether the proposed stipulation should be entered. The solicitation of a stipulation should include a detailed report demonstrating full compliance with appropriate documentation.

(19) If the plaintiffs and the Adams intervenors agree that the defendants have achieved compliance, the parties should so stipulate and the stipulation should be filed with the court on or before the deadline date.

(20) If the parties dispute whether the defendants have achieved compliance, the matter in dispute should be submitted to the court-appointed monitor for mediation on an expedited basis in sufficient time before the deadline for the sanctions to commence by the deadline date. Before exercising their right to seek early imposition of sanctions, the plaintiffs and the Adams intervenors must notify the defendants of the alleged deficiency and submit the matter in dispute to the monitor for mediation.

(21) If the defendants are unable to obtain a stipulation of compliance from the other parties by the deadline date, the defendants must begin automatic payment of daily monetary sanctions until relieved therefrom by an order of the court that they have in fact fully complied with the subject provision of consent decree I. If the defendants file a motion before the commencement of any such fine contending that they were in full compliance by the deadline date, and the court determines that the defendants were in compliance on the date such fines commenced as alleged in the motion, the court must enter an order refunding to the defendants any fines paid since the deadline date.

(22) The plaintiffs and intervenors should not unreasonably withhold stipulation of compliance and will promptly provide the defendants with a written statement specifically identifying in what respects the plaintiffs and/or intervenors contend the defendants have not complied with the subject provision of consent decree I within 15 business days after being served with the defendants' report of compliance.

(23) If the defendants acknowledge that they are not in compliance with any provisions of consent decree I by the appropriate specified deadlines, they should notify all parties and file a Notice of Non-Compliance with the court not later than the specified deadline for daily monetary sanctions to begin.

Non-coercive Remedies and Sanctions

(24) The remedies agreement does not resolve issues concerning what non-coercive remedies or compensation, if

any, should be awarded to redress or undo the effects of the defendants' non-compliance and contempt. Such remedies must be determined by further agreement of the parties or order of the court after hearings thereon. The parties agree to submit briefs on the issues necessary to resolve the remedies under this Section by February 11, 2000.

(25) The plaintiffs contend that the court should expedite such further remedial proceedings for the defendants' contempt of consent decree I and related orders but that any such proceedings requiring individualized determinations should not be conducted before the resolution of all claims and proceedings required by article XX of consent decree I except insofar as the court conducts any such individualized remedial proceedings for the defendants' contempt and determines the relief thereon for the plaintiffs and the members of the plaintiff class at the same time as it hears and/or determines their remedies under article XX of consent decree I. The Adams intervenors contend that remedies for all persons injured by the defendants' non-compliance should be resolved promptly. The defendants reserve the right to contend that no further relief, beyond that granted pursuant to the remedies agreement, is necessary or appropriate and that the court should exercise its discretion to deny any such additional remedies.

(26) The plaintiffs do not consent to the Adams intervenors' claim that they should be awarded compensation or any other remedy for the defendants' contempt, and, by entering the remedies agreement and consenting to any order entered pursuant hereto, the plaintiffs do not waive their contentions that such relief should not be awarded, that the

intervenors lack standing, and that this court lacks jurisdiction over the intervenors' contempt motion and request for relief. The Adams intervenors reserve their responsive contentions and further contend that the plaintiffs lack standing to oppose the intervenors' contempt motion and request for relief.

(27) The remedies agreement does not in any way resolve or foreclose any employee's individual rights and remedies, if any, under federal or state law or under consent decree I or related orders and injunctions entered in this case, nor does it foreclose any employee's right to pursue such rights and remedies independently of the contempt motions.

Deadlines for Commencement of Sanctions

(28) The dates, by provision in consent decree I, that the above coercive sanctions are to commence in the absence of a stipulation or court order determining that full compliance has been achieved are as follows:

> *Article I:* May 31, 2000, except that the deadline for full implementation of licensing preparation program in ¶ 1(f) shall be August 15, 2001, and the deadline for a written plan for full compliance shall be April 1, 2000.
>
> *Article II:* December 31, 2000, for SPD Project Classifications and October 1, 2001, for non-SPD Project Classifications.
>
> *Article III:* August 30, 2000, except that the deadline for having the registers approved and

ready for issuance of certificates of eligibles shall be December 31, 2000, for all non-entry level SPD Project Classifications, and October 1, 2001, for all non-SPD Project Classifications; and the deadline for full compliance with the provisions of article III, ¶ 2(a) shall be June 1, 2000.

Article VI: March 31, 2000, for permanent selection procedures.

Article VII: February 1, 2000, for permanent selection procedures, and for interim selection procedures only to the extent set forth in the parties' agreement on interim selection procedures dated February 16, 1999.

Article VIII: May 15, 2000, for permanent selection procedures, and for interim selection procedures only to the extent set forth in the parties' agreement on interim selection procedures dated February 16, 1999, except that structured interviews for non-SPD Project Classifications are to be approved by the court and ready for use by December 31, 2000, and the deadline for the OCB interviews to be approved and used for SPD Project Classifications shall be April 15, 2000.

Article IX: May 31, 2000, for permanent selection procedures, and for interim selection procedures only to the extent set forth in the parties' agreement on interim selection procedures

dated February 16, 1999 (Doc. No. 3639), except the deadline for the monitoring procedures shall be February 15, 2000.

Article X: April 1, 2000, except the deadline for ¶ 3(a) shall be May 15, 2000.

Article XI: April 15, 2000, including documentation in writing of all affirmative steps undertaken pursuant to ¶ 11 by that date.

Article XIII: June 30, 2000, except that notification to recruitment sources of discontinuance of EIT shall be repeated by June 1, 2000.

Article XIV: April 30, 2000, except that the deadline for full compliance with article XIV, ¶ 2 shall be February 29, 2000, and the deadline for a complete schedule for implementation of the rotation and training programs under ¶ 3(c) (but not the proportionality provision) for all applicable classifications shall be June 30, 2000. Once the schedule for compliance with the rotation and training programs under ¶ 3(c) has been completed, deadlines for coercive sanctions pursuant to Section IV of the remedies agreement shall be set by agreement of the parties or order of the court.

Article XV: February 29, 2000, except that the deadline for completing multigrade studies for

all remaining non-SPD Project classifications, including those covered in Doc. No. 4015 shall be August 30, 2001. For future multigrade job studies, ¶ 3(d) shall be implemented, where applicable, within 60 days after the approval of the collapsed classification by the State Personnel Board.

Article XVI: May 15, 2000.

Article XVII: April 30, 2000.

Article XVIII: April 30, 2000.

Article XIX: March 1, 2000, except that the deadline for any revisions to the affirmative action plan shall be April 1, 2000.

Implementation of Article XV, ¶ 3(d)

(29) Solely for the purpose of fixing the minimum steps necessary to avoid the triggering of coercive sanctions by the deadline date of February 29, 2000, and not for the purpose of determining what constitutes full compliance with article XV, ¶ 3(d) of consent decree I, the parties agree that defendants will be relieved of paying such coercive fines for contempt of article XV, ¶ 3(d) by fully implementing the following steps by February 29, 2000:

(a) As to each employee in a consolidated classification (those currently in a consolidated classification and those who have been in a

consolidated classification at any time since February 1998), the defendants are to determine what each employee's pay level would have been as of April 1996 had the new consolidated classification structure historically been in place instead of the former classification structure.

(b) The defendants are then to project each employee's pay level as if each employee had been in the new consolidated pay range from April 1996 to present.[21]

(c) The defendants are then to place each employee in the resulting pay step within the new consolidated pay range, if the employee's projected pay step is higher than the employee's current pay step. No employee's pay step shall be reduced as a result of the implementation of this provision.

(d) The defendants are to produce to the plaintiffs' and intervenors' counsel the calculations and determinations required above for each employee in a consolidated classification.

(30) These steps are adopted as a compromise in resolution of a disputed issue. By entering into the remedies agreement, the parties do not waive their respective

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21. In the event an employee has not been in the consolidated classification since April 1996, the defendants are to apply this procedure from the date the employee entered the consolidated classification.

contentions concerning the proper interpretation of article XV, ¶ 3(d). The plaintiffs and Adams intervenors reserve the right to contend that, if it is later determined that an employee should have been promoted at an earlier date, that employee's pay step must be recalculated hereunder. Nothing in the remedies agreement should be construed as an admission that the foregoing method of implementation of article XV, ¶ 3(d) is correct. The "years-of-service" issue remains pending in the court.

Filling of Vacancies

(31) Pursuant to the provisions of article VII, ¶¶ 1 and 2, the Transportation Department is to take all reasonable steps necessary to ensure that, whenever a vacancy occurs, either (a) a request to fill the position is made within 30 days of the event causing the vacancy or (b) the State Personnel Department is notified within 30 days that the Transportation Department does not intend to fill the position, and the reason the position is not to be filled. Positions that are not to be filled must be abolished. Such notices will be produced to the parties, through counsel, as part of the monthly compliance report.

(32) Use of out-of-classification assignments is to be eliminated by March 30, 2000. Thereafter, duties or positions may be assigned on an out-of-classification basis only when necessary on a temporary or emergency basis. A vacant position may be assigned out of classification only (a) when the position is to be filled and a request has been made to fill the position and (b) for the period of time required to fill the position with a properly classified employee. Requests to

assign a vacant position on an out-of- classification basis must be made by the bureau or division in writing and are subject to the approval of the Transportation Department's Director. Such requests are to be produced to the parties on a monthly basis as part of the defendants' monthly compliance report.

(33) These provisions regarding the filling of vacancies do not control the manner in which positions are to be filled. The parties reserve their respective contentions concerning the method of filling vacant positions.

Use of Consultants

(34) The plaintiffs and defendants agree as follows regarding the use of consultants:

> (a) The Transportation Department currently uses consultant employees to perform construction engineering and inspection (CE & I) work. Consultants are contracted to perform such work pursuant to both project specific and "on-call" contracts.
>
> (b) The plaintiffs and defendants wish to adopt a plan for The Transportation Department to cease using CE & I consultants on a regular basis. The Transportation Department's use of consultant employees to perform construction engineering and inspection work will be phased out over a period of 15 months. The 15-month period shall commence on the day that certificates

of eligibles are issued by the State Personnel Department to fill currently existing Engineering Assistant vacancies, or Engineering Assistants to fill such vacancies are otherwise appointed, but not later than June 1, 2000. Beginning in January, 2000, the Transportation Department shall provide to the parties, on a monthly basis, a report of the CE & I consultant employees who are then currently performing services for the Transportation Department. The report shall include the nature of work being performed, the location of the work, and the identity and race of the consultant employee. The Transportation Department will use its best efforts to reduce the number of consultants as soon as it can practically do so.

(c) The Transportation Department may continue to enter into contracts when necessary to ensure the availability of CE & I consultants when the need for such consultants arises. Upon the completion of the 15-month phase-out period as set forth above, and for the remaining term of the consultants agreement, the Transportation Department will use CE & I consultant employees pursuant to such contracts only when the use of consultants is consistent with business necessity. For purposes of the consultants agreement, "business necessity" means the absence of available merit system employees or the impracticability of employing such merit system employees to timely and adequately perform the work to be performed by consultant employees.

(d) Whenever the Transportation Director deems it necessary to use CE & I consultant employees, he shall issue a notice, through counsel, to the parties. The notice shall set forth the identity of the consultant to be used, the nature of the work to be performed, the location of the work to be performed, and the expected duration of the use of such consultant employees. In addition, the notice shall set forth the reason that the Transportation Director deems it necessary to use CE & I consultants instead of merit system employees to perform the work. Upon determination of the identity of the consultant employees to be used, the plaintiffs shall receive a notice concerning the identity and race of the consultant employees.

(e) The agreement regarding the use of consultants expires on June 1, 2003.

(f) The terms of the consultant agreement apply only to the use of consultant employees to perform construction engineering and inspection duties. The use of consultants to perform other types of services, including without limitation, design, right of way, environmental and materials testing, and road and bridge construction services, is not restricted by the agreement.

(g) The plaintiffs reserve the right to bring a new motion to prohibit the use of consultants, for further relief under consent decree I, and to hold

the defendants in contempt, if the Transportation Department fails to begin the agreed upon phase out, does not use its best efforts to reduce the number of consultants, or fails to act consistently with the consultants agreement, or if the plaintiffs conclude that the use of other types of consultant services warrant such action. The defendants enter into the consultants agreement solely as a compromise in order to resolve the plaintiffs' claims of contempt. The defendants do not in any way agree that the Transportation Department's use of consultants is improper or violative of any law, regulation, order, or injunction, including, without limitation, the terms of consent decree I, and reserve the right to oppose any motion or request for relief filed by the plaintiffs.

(35) The Adams intervenors do not join in the agreement regarding the use of consultants, and they reserve any contention or objection that they may have with regard to the use of consultants.

Final Provisions

(36) The parties stipulate that time is of the essence and that there are to be no extensions of the deadlines for compliance, and no excuses or justifications recognized for any failure to meet such deadlines, unless otherwise agreed by the parties hereto or ordered by the court.

(37) The parties agree that the remedies agreement and any orders entered pursuant thereto do not enlarge, diminish,

or otherwise have any effect upon the standing of any party or the court's jurisdiction. The plaintiffs reserve any and all rights and contentions in opposition to the Adams intervenors' participation in and right to benefit from the remedies agreement, consent decree I, the defendants' contempt of such decree, and any other aspect of this case.

(38) The remedies agreement resolves the issues of the defendants' contempt to the extent set forth herein, subject to the provisions of the section above on non-coercive remedies and sanctions above. The agreement and the initial order entering the agreed upon finding of contempt and adopting the remedies set forth herein do not resolve or preclude the court from resolving any issues or claims other than the following two issues: (1) whether the defendants have been and are in contempt of consent decree I and the court's orders and injunctions related to its enforcement, and (2) what coercive remedies should be entered for such contempt. The remedies agreement does not affect, alter, or diminish the court's authority or jurisdiction to hear, rule upon, or address any other issues or matters in this case, or preclude the parties from seeking any such resolution or remedies from the court. The remedies agreement does not foreclose any party's right to file further motions raising other aspects of the defendants' noncompliance. The parties agree that they will not contend that the remedies agreement has any preclusive effect upon the status of any other issues or matters. The remedies agreement also does not alter or affect any other agreement between the parties including, but not limited to, the parties' agreement concerning interim appointment procedures and the parties' agreements concerning attorneys' fees.

(39) The parties waive any right to appeal or further contest the remedies agreement and the initial order entering the agreed upon finding of contempt and adopting the remedies set forth herein. This appeal waiver is limited to the foregoing and does not apply to any subsequent order.

(40) The defendants and plaintiffs agree, without the consent of the Adams intervenors, that the defendants are to pay the fees and expenses of the plaintiffs' attorneys for all work related to the contempt proceedings, monitoring and enforcing the defendants' compliance with consent decree I and the remedies for contempt provided for herein, and whatever proceedings or work is necessary to obtain or effectuate such decree and remedies for contempt. The fees and expenses are to be paid according to the terms of the plaintiffs and defendants' agreement dated February 26, 1999; provided, however, that the defendants' obligation to pay the fees and expenses required by the agreement is not terminated or affected by the expiration, termination, or other ending of the agreement dated February 26, 1999, unless otherwise expressly agreed by the plaintiffs and the defendants.

(41) The defendants and the Adams intervenors agree, without the consent of the plaintiffs, that the defendants are to pay the fees and expenses of the Adams intervenors' attorneys for all work related to the contempt proceedings, monitoring and enforcing the defendants' compliance with consent decree I and the remedies for contempt provided for herein, and whatever proceedings or work is necessary to obtain or effectuate such decree and remedies for contempt.

Appendix E

The fees and expenses are to be paid according to the terms of the defendants and the Adams intervenors' agreement dated February 20, 1996.

(42) The parties agree that, in the event that any provision or term of the remedies agreement, or the initial order finding the defendants in contempt and implementing the remedies set forth herein, should be determined to be or is otherwise rendered unenforceable, all other provisions and terms of the agreement are to remain unaffected to the extent permitted by law. If the deadline extensions agreed upon by the plaintiffs and the defendants are not approved, the plaintiffs reserve the right to seek further relief pursuant to article XIX, ¶ 6 of consent decree I.

(43) The parties agree that the court retains jurisdiction over the remedies agreement and any order implementing the agreement until the issues regarding the defendants' contempt (including issues of compensatory relief) are resolved and the defendants have achieved full compliance with the consent decree provisions that are the subject of the agreement.

II.

All parties are to be commended for resolving most of the civil-contempt issues among themselves. This cooperation reflects, the court hopes, a full commitment by the Transportation Department and the Personnel Department to full and certain compliance with all provisions of consent decree I by 2006, with the welcome result that this litigation

can be brought to an end at that time and the full supervision of these two departments returned where it belongs, to the State of Alabama.

III.

Based on the foregoing stipulations, agreements, evidence, and proceedings, the following is the ORDER, JUDGMENT, and DECREE of this court:

(1) Defendants Alabama Department of Transportation and State Personnel Department are held in civil contempt of consent decree I and the court's orders and injunctions enforcing such decree, as set forth in the parties' agreement to remedies for contempt, filed December 17, 1999 (Doc. no. 4247), until such time as they have affirmatively demonstrated that they have achieved full compliance with such decree, orders, and injunctions.

(2) The defendants must, by the dates set forth below, demonstrate full compliance with each article of consent decree I. The coercive sanctions set forth below (and in Section II of the parties' remedies agreement) shall begin automatically on the dates provided herein (and in Section V of the remedies agreement) in the absence of a stipulation of the parties or order of the court establishing the defendants' full compliance. As to each article for which one of the deadlines in paragraph three of this order has not been met, the following sanctions will apply:

(a) On the first day following the expiration of the deadline date, and on each subsequent day

until full compliance is stipulated by the parties or found to have been achieved by the court, the defendants shall pay the sum of $ 500.

(b) Should the defendants' non-compliance continue for more than 30 days following the deadline date, beginning on the 31st day, and on each subsequent day until full compliance is stipulated by the parties or found to have been achieved by the court, the defendants shall pay the sum of $ 1,000.

(c) Should the defendants' non-compliance continue for more than 60 days following the deadline date, beginning on the 61st day, and on each subsequent day until full compliance is stipulated by the parties or found to have been achieved by the court, the defendants shall pay the sum of $ 1,500.

(d) Should the defendants' non-compliance continue for more than 90 days following the deadline date, the plaintiffs shall notify the court, and the court will set an emergency hearing to determine appropriate additional sanctions and remedies for continued non-compliance on an expedited basis.

(e) The sanctions set forth above shall apply, separately and severally, to each article of consent decree I. The foregoing sums shall be paid into the registry of the court on a weekly basis.

Appendix E

(3) The coercive sanctions in this paragraph shall commence by the following deadlines in the absence of a stipulation or court order determining that full compliance has been achieved:

CONSENT DECREE PROVISIONS	DEADLINE FOR COMMENCEMENT OF SANCTIONS
Article I:	May 31, 2000, except that the deadline for full implementation of licensing preparation program in ¶ 1(f) shall be August 15, 2001, and the deadline for a written plan for full compliance shall be April 1, 2000.
Article II:	December 31, 2000, for SPD Project Classifications and October 1, 2001, for non-SPD Project Classifications.
Article III:	August 30, 2000, except that the deadline for having the registers approved and ready for issuance of certificates of eligibles shall be December 31, 2000, for all non-entry level SPD Project Classifications, and October 1, 2001, for all non-SPD Project Classifications; and the deadline for full compliance with the provisions of article III, ¶ 2(a) shall be June 1, 2000.

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Article VI: March 31, 2000, for permanent selection procedures.

Article VII: February 1, 2000 for permanent selection procedures, and for interim selection procedures only to the extent set forth in the parties' agreement on interim selection procedures dated February 16, 1999.

Article VIII: May 15, 2000, for permanent selection procedures, and for interim selection procedures only to the extent set forth in the parties' agreement on interim selection procedures dated February 16, 1999, except that structured interviews for non-SPD Project Classifications are to be approved by the court and ready for use by December 31, 2000, and the deadline for the OCB interviews to be approved and used for SPD Project Classifications shall be April 15, 2000.

Article IX: May 31, 2000, for permanent selection procedures, and for interim selection procedures only to the extent set forth in the parties' agreement on interim selection procedures dated February 16, 1999 (Doc. No. 3639), except the deadline for the monitoring procedures shall be February 15, 2000.

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Article X:	April 1, 2000, except the deadline for ¶ 3(a) shall be May 15, 2000.
Article XI:	April 15, 2000, including documentation in writing of all affirmative steps undertaken pursuant to ¶ 11 by that date.
Article XIII:	June 30, 2000, except that notification to recruitment sources of discontinuance of EIT shall be repeated by June 1, 2000.
Article XIV:	April 30, 2000, except that the deadline for full compliance with article XIV, ¶ 2 shall be February 29, 2000, and the deadline for a complete schedule for implementation of the rotation and training programs under ¶ 3(c) (but not the proportionality provision) for all applicable classifications shall be June 30, 2000. Once the schedule for compliance with the rotation and training programs under ¶ 3(c) has been completed, deadlines for coercive sanctions pursuant to Section IV of the remedies agreement shall be set by agreement of the parties or order of the court.
Article XV:	February 29, 2000, except that the deadline for completing multigrade studies for all remaining non-SPD Project classifications, including those

covered in Doc. No. 4015 shall be August 30, 2001. For future multigrade job studies, ¶ 3(d) shall be implemented, where applicable, within 60 days after the approval of the collapsed classification by the State Personnel Board.

Article XVI: May 15, 2000.

Article XVII: April 30,2000.

Article XVIII: April 30, 2000.

Article XIX: March 1, 2000, except that the deadline for any revisions to the affirmative action plan shall be April 1, 2000.

(4) The remedies agreement of the parties is adopted in its entirety as the order of the court, with the exception of the agreement of the plaintiffs and the defendants for extension of consent decree I, and the parties are ENJOINED to comply with its terms in full.

(5) The term of consent decree I is extended as follows:

(a) The decree is extended in its entirety until December 31, 2004.

(b) The provisions of the decree affecting the recruitment and selection requirements of the decree — specifically article I, article III (¶¶ 2, 3,

and 12), articles VI through X, article XI (¶¶ 11 and 21), article XIII (¶¶ 1(a) and (c), 2, 3(d), and 11), article XIV, and article XIX, (¶¶ 1-5, 6(a-d), and 7) — are extended until December 31, 2006, with the special affirmative action training of article XVI, ¶ 1, to be repeated in 2002 and 2004.

(c) Prior to expiration of the terms provided, the parties may seek further extension of any provision for which the defendants are not in full compliance.

(d) The plaintiffs retain the right to seek extension of the duration of all or part of the decree pursuant to the provisions of article XIX, ¶ 10 of the decree, and the defendants retain the right to oppose any such further extension.

(e) The plaintiffs retain the right to seek to restore the full amount of time that each provision of the decree was intended to operate after the initial compliance as a remedy for the defendants' contempt, and the defendants retain the right to oppose any such further extension.

(6) As set forth in the parties' remedies agreement, this order and the parties' underlying agreement resolve the plaintiffs' motions for contempt and further relief, filed February 13, 1997 (Doc. nos. 1542 and 1543) and the Adams intervenors' motion for contempt enforcement through race neutral means, filed September 20, 1999 (Doc. no. 4167), with respect to the issues of the defendants' non-compliance

and the coercive remedies and sanctions for such non-compliance, but do not resolve any other remedial issues regarding the defendants' contempt or the foregoing motions (including, without limitation, compensatory relief). The parties shall submit briefs on the issues necessary to resolve further remedial issues by February 11, 2000.

(7) The court retains jurisdiction over the remedies agreement and any order implementing the agreement until the issues regarding the defendants' contempt (including issues of compensatory relief) are resolved and the defendants have achieved full compliance with the consent decree provisions that are the subject of the agreement.

DONE, this the 31st day of January, 2000.

s/ Myron H. Thompson
MYRON H. THOMPSON
UNITED STATES DISTRICT
JUDGE

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION DATED AND FILED MAY 23, 2000

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

ORDER

[In re: *Reynolds v. Roberts*, 207 F.3d 1288 (11th Cir. 2000)]

In the above-styled Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit, entered and issued as mandate on March 29, 2000, the Eleventh Circuit invoked the provisions of 28 U.S.C. § 1927, stating that the "abuse" of the "judicial process" in this litigation by Plaintiffs' counsel "was as gross as any we have encountered."[1] *Reynolds v. Roberts*, 207 F.3d 1288, 1299

1. Section 1927 provides that "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any (Cont'd)

(11th Cir. 2000). After holding that it has authority to impose sanctions under 28 U.S.C. § 1927, the Eleventh Circuit stated that "[c]ounsel subject to section 1927 sanctions are entitled to be heard regarding the matter." *Id.* at 1302. Thus, the Eleventh Circuit remanded this action with the following limited instruction: "[O]n receipt of mandate, the chief judge of the Middle District of Alabama will assign the case to himself or another district judge . . . for the purpose of enabling [P]laintiffs' counsel to show cause why section 1927 sanctions should not be awarded to the Adams intervenors." *Id.* Thus, having been assigned to the undersigned and as instructed by the Eleventh Circuit, this cause is before the court in order to afford Plaintiffs' counsel an opportunity to be heard on the issue of whether or not § 1927 sanctions should be assessed against them and awarded to the Adams intervenors.

As detailed in *Reynolds*, the Eleventh Circuit is considering the award of § 1927 sanctions to the Adams intervenors based on the conduct of Plaintiffs' counsel. Said conduct arises from counsel for Plaintiffs' request for injunctive relief where they sought to prohibit non-blacks from using the race-neutral Revised Complaint Procedure, which "the parties had fashioned and the court has approved." *Id.* at 1291-92. The Eleventh Circuit made the following findings as to the actions of Plaintiffs' counsel:

> To say that the Revised Complaint Procedure somehow "violates" Consent Decree I, as plaintiffs' counsel contended in their application for a permanent injunction (barring non-blacks from invoking it) is more than sophistic; it is preposterous. So, why did plaintiffs' counsel file their application for a permanent injunction which

> would limit the protection afforded by the complaint procedure to blacks only? Because they thought they had made a bad bargain, and they wanted to undo it. But, instead of asking the court to void the contract, however, for mutual mistake of fact or some other legally-recognized ground for vitiating contracts (which would have been the professional thing to do, assuming that they could satisfy Rule 11's ethical/professional standard), plaintiffs' counsel claimed that the revised procedure "violated" Consent Decree I.

Id. at 1300 (internal footnote omitted).

As further found by the Eleventh Circuit, in requesting injunctive relief, Plaintiffs' counsel "proceed[ed] strictly on their own," "were actually representing no one but themselves," and "invited the error the district court committed" when it granted the requested injunctive relief. *Id.* at 1299, 1301. Moreover, according to the Eleventh Circuit, "[P]laintiffs' counsel have attempted to defend the district court's ruling on appeal with baseless arguments." *Id.* at 1301. It is against this background and these findings that this court proceeds.[2]

(Cont'd)
Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927.

2. The above findings are, in sum, those made by the Eleventh Circuit. This Order does not recite the frequency nor the repeated emphasis, *q.v.*, with which the findings are made by the Eleventh Circuit.

Appendix F

Accordingly, it is CONSIDERED and ORDERED as follows:

(1) that Counsel for Plaintiffs show cause on or before June 5, 2000 as to why § 1927 sanctions should not be awarded to the Adams intervenors;

(2) that Counsel for the Adams intervenors may file a responsive brief on or before June 16, 2000, *if desired*;[3] and

(3) that Counsel for Plaintiffs may file a reply brief on or before June 26, 2000.

Thereafter, the court will notify the parties if it deems necessary further briefing, oral argument and/or an evidentiary hearing.

DONE this 23rd day of May, 2000.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

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3. *See Bradley v. Campbell*, 832 F.2d 1504, 1515 (10th Cir. 1987).

APPENDIX G — ORDER AND PRELIMINARY INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA DATED AND FILED APRIL 9, 1997

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

ORDER AND PRELIMINARY INJUNCTION

This matter is before the court on the plaintiffs' oral motion for preliminary injunction, made at the close of the hearing on March 27, 1997. The plaintiffs' request would extend the temporary restraining order currently in place until such time as the court rules on their motion for permanent injunction, filed March 10, 1997 (Doc. nos. 1636, 1642), against defendants State Personnel Department and Alabama Department of Transportation, which was the subject of the hearing. For the reasons that follow, the motion for preliminary injunction is granted.

Appendix G

In the orders entered on February 27, 1997 (Doc. no. 1587), and March 10, 1997 (Doc. no. 1644), the court explained that the plaintiffs must satisfy a four-prong test for determining whether a temporary restraining order should issue. The same test applies for a preliminary injunction. Under this test, the movant must show: "(1) a substantial likelihood that she will ultimately prevail on the merits; (2) that she will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that if issued, the injunction would not be adverse to the public interest." *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir.1988).

The subject of this dispute is whether the court should allow the Transportation Department to honor so-called settlements to grievances filed by three white employees, Michael Grant, John D'Arville and Andrew McCullough. These three employees contend that they and the Transportation Department entered into settlements that provide them with the award of provisional appointments, backpay, salary increases, and retroactive dates of appointment.

The issue was initially framed as a challenge to the application of the grievance process in these cases, and the conflict created between the grievance process and certain provisions of consent decree I and orders enforcing the decree. However, during the course of the four-day hearing, the evidence compellingly demonstrated the significance of this matter to broader issues in this lawsuit, implicating of some of the most basic and critical underpinnings of the decree.

Admittedly, the defendants join the plaintiffs in contending that Grant, D'Arville, and McCullough are misusing the grievance process, and thus the defendants agree, in words of defense counsel, that the court should "stop the [grievance] procedure for everyone right here, both black and white."[1] However, because Grant, D'Arville, and McCullough do oppose the plaintiffs' efforts, the court must apply the four-part test for preliminary injunctive relief.

First factor — Likelihood of success: The court finds the award of provisional appointments in this case, as Grant, D'Arville, and McCullough would have it, would likely conflict with both specific provisions and the general purposes of consent decree I.

Specifically, the provisional appointment of these three white persons would call into question article I (recruitment), article IV (provisional appointments), article XI (proportional assignments), article XIV (rotation of job duties), article XVI (training), and article XV (reclassification). The general purposes are also challenged, as most clearly illustrated by article XIX, ¶ 6(d):

> "It is the intent and purpose of this Decree to undo the effects of the past practices which have been the subject of this case and Decree and to prevent further practices which may perpetuate such efforts or otherwise discriminate against the plaintiffs or the class they represent. To the extent that this Decree fails to achieve the intent and purpose for which it has been entered, the parties may seek further relief from the Court."

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1. Transcript of hearing held on March 24, 1997, at 33.

Appendix G

The consent decree set up an *open and competitive* system in which persons, regardless of race, could pursue and be considered for promotions, both provisional and permanent, on the basis of merit.

Perhaps the most compelling testimony in this regard was that of Don Arkle, who is Alabama Department of Transportation design bureau chief and is white. Arkle testified that the best feature of the consent decree was that it would prohibit the prior practice which allowed supervisors and employees to circumvent the merit selection process then in place, and to promote employees based on personal bias and other non-merit criteria. Testimony presented to the court prior to the entry of the consent decree strongly suggested that one of the criteria often used by supervisors and employees in this hidden and biased manner, was race. The exchange in open court with Arkle was as follows:

> "MR. WIGGINS: And you testified that you're knowledgeable that the Decree was intended to end the practice of circumventing the Certificate of Eligibles in the register process, correct?
>
> "MR. ARKLE: Yes.
>
> "MR. WIGGINS: And you personally think that's one of the best features of the Consent Decree, that it ends that practice.
>
> "MR. ARKLE: Yes, sir, I do."

Arkle then acknowledged that the use of the grievance procedure, as Grant, D'Arville, and McCullough would like

it to be, would essentially again allow supervisors and employees to circumvent the open merit selection process, and would reintroduce the condemned non-competitive, secretive, hand-picking process, albeit as a one-time event. A supervisor need only select a favorite employee to work out of class, and the employee need only then file a grievance to be then provisionally promoted to the new out-of-classification position. The grievance process would then essentially become a closed, non-competitive means for promotion.

> "MR. WIGGINS: But now these grievances and this whole out of classification reclassification effort is going to reinstall it, isn't it?
>
> . . .
>
> "THE COURT: Let me ask this: How will it be different?
>
> "MR. ARKLE: Well, the one time it made everybody in the proper classification they're working in.
>
> . . .
>
> "THE COURT: Other than the fact this occur[s] at one time rather than repeated occurrences, do you know of any other difference between what's being proposed here with the grievance and what was going on before in the Consent Decree?

Appendix G

"MR. ARKLE: I'm not sure I understand the question.

"THE COURT: Well, your answer to my question was that it was a one time occurrence. And, I'm asking, is that the only distinguishing characteristic?

"MR. ARKLE: I guess so."

Similarly, the principal purpose of the court's orders of September 18, 1995 (Doc. no. 753), and July 11, 1996 (Doc. no. 1131), as they relate to provisional appointments, is the attempted installation of an open competitive process to replace the former system of patronage. This goal is likewise confounded by the selective awarding of provisional appointments through the assignment of out-of-classification duties.

The grievants refer the court to the recommendations of Special Masters Laurie Edelstein and Winn S.L. Faulk and court orders which ruled on the grievances of Hudson Hinton and David Lee Sims, two plaintiff class members, which they say compel their provisional appointments.[2] Their reliance on these matters is misplaced, and amounts only to bootstrapping. Hinton was found to be deserving of a provisional appointment because McCullough had been wrongfully promoted, while Hinton was passed over because of his race, which is African-American. Now McCullough

---

2. Orders entered October 19, 1997, Doc. no. 1299, and February 4, 1997, Doc. no. 1512.

argues that because Hinton was promoted, he is entitled to a similar upgrade in position — a leap-frogging that would never end. The remedy granted to Hinton attempted to place him on an even footing with McCullough. His promotion was made to redress the fact that he had been the victim of intentional race discrimination. This cannot, by any twisted logic, be a basis to grant McCullough a right to a second promotion or to give Grant and D'Arville a right to initial promotions. Moreover, as for grievant Grant, he registered a first complaint and request for promotion, deemed to be without merit, before filing the current grievance. Only after Hinton had received his appointment was Grant's second claim processed, and his provisional appointment recommended. Again, a remedy for Hinton cannot create a right for Grant.

The Sims grievance gives little or no direct guidance to the issues at hand, because the Transportation Department raised as a defense only the issue of whether a state hiring freeze prevented Sims's provisional appointment which, Special Master Faulk determined, he was otherwise due. In light of the special master's findings that the freeze did not prevent Sims's promotion, the court never reached the issues of equitable assignment of out-of-classification duties.

Second and third factors — Irreparable harm and damage to opposing party: In its earlier orders on this point, the court has emphasized the value it places on avoiding the "bumping" of employees in deciding Title VII cases. *See Hicks v. City of Dothan*, 814 F. Supp. 1053 (M.D. 1993). Here, to allow the provisional appointment of these three grievants to go through could result in their having a vested

interest in the positions awarded. Should the court, upon fuller consideration of all the issues involved, find that the provisional appointments are invalid, it would be forced to attempt to remove the grievants from these positions. In other words, to allow the appointments to take place could create irreparable harm.

After hearing the evidence presented, however, the court finds a far stronger rationale for this conclusion. The Alabama Department of Transportation informs the court that it has approximately 35 grievances based on the same or similar grounds, currently making their way through the grievance procedure. That fact makes clear that permitting these appointments to go forward would unleash chaos within the Transportation Department, resulting in a stampede into positions which could render any possible system-wide remedy, based on open competition, impossible to implement. On the other hand, should the court find that the grievants are entitled to these appointments, any harm from the delay in appointment is minuscule.

Finally, at the close of the hearing, the parties noted that there is evidence still to be considered by the court before full and final consideration of these issues. The parties may yet be called upon to file supplemental briefing as well. It is, therefore, necessary and wise to maintain the status quo until such additional information is before the court.

Fourth factor — Public interest: Finally, the integrity of the decree and orders of the court enforcing it are a matter of public interest, and the issues presented in this hearing threaten the overriding aspiration of consent decree I: an open and above-board competitive process to fill positions in the

Alabama Department of Transportation. There is no question but that this vital interest warrants the relatively unburdensome imposition of a preliminary injunction.

Accordingly, it is the ORDER, JUDGMENT and DECREE of the court as follows:

(1) That the plaintiffs' oral motion for preliminary injunction, made in open court on March 27, 1997, is granted; and

(2) That defendants State Personnel Department and Alabama Department of Transportation, their officers, agents, servants, employees, and those persons in active participation with them who receive actual notice of this order, are each preliminarily ENJOINED and RESTRAINED from provisionally appointing, promoting or paying backpay to employees Andrew McCullough, Michael Grant, and John D'Arville pursuant to the grievances they filed.

The clerk of the court is DIRECTED to issue a writ of injunction.

The clerk of the court is DIRECTED to provide for service of this injunction upon defendants State Personnel Department and Alabama Department of Transportation and Jimmy Butts by certified mail, returned receipt requested.

DONE, this the 9th day of April, 1997.

s/ Myron H. Thompson
UNITED STATES DISTRICT
JUDGE

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA DATED AND FILED MARCH 31, 1997

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

ORDER

This matter is before the court on plaintiffs' motion for temporary restraining order and/or preliminary injunction, filed March 28, 1997 (Doc. no. 1716). Based upon the agreement of the parties that defendants will temporarily cease processing grievances of the type that are the subject of the motion, it is ORDERED that the motion for temporary restraining order is denied. The parties stipulate that this voluntary cessation does not implicate any grievance now pending before the court.

Appendix H

It is further ORDERED as follows:

(1) The motion for preliminary injunction, filed March 28, 1997 (Doc. no. 1716), is treated as one for permanent injunction.

(2) All parties are to file pretrial briefs by 4:00 p.m. on April 8, 1997.

(3) The matter is set for a hearing at 10:00 a.m. on April 11, 1997 in the Frank M. Johnson, Jr. Courthouse and Federal Building in Montgomery, Alabama.

DONE, this the 31st day of March, 1997.

s/ Myron H. Thompson
UNITED STATES DISTRICT
JUDGE

APPENDIX I — MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION DATED AND FILED MARCH 28, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NUMBER:
CV-85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Comes the plaintiffs, who move the Court for entry of a temporary restraining order and/or preliminary injunction prohibiting the defendants from further processing grievances or "resolutions" of grievances that involve appointment or reclassification to positions by means other than recruitment, announcement and competitive selection, including related remedies, such as back-pay, retroactive service histories, etc. As grounds, the plaintiffs' state the following:

Appendix I

1. Supervisors and managers of the Transportation Department have unilaterally "resolved" grievances filed by white employees by awarding them provisional appointments, backpay and other remedies at Stage I of the Grievance Procedure without any effort to post, announce, recruit or competitively fill such opportunities as required by the Consent Decree and various Orders and Injunctions entered by the Court in the last year. See Orders and Injunctions of July 11, 1996 and October 18, 1996 (Docs. ##1131, 1132, 1299, 1300). See also, Consent Decree I, Article I, ¶ ¶ 5-6, Article IV, ¶ 3, Article IX, ¶ 6, Article XIV, ¶ 2(b), Article XI, ¶ 11. Such "resolutions" have been made in the following grievances and in others not currently known:

No. 132 — Eric English
No. 133 — Gabriel Roundtree
No. 134 — George Rollins
No. 135 — Robert Camp, Jr.
No. 136 — Horace Roundtree
No. 137 — Charles Alexander
No. 138 — Robert Beason
No. 139 — Jeffery Odom
No. 140 — Willie G. Frames
No. 141 — Gary Spears
No. 142 — Bradley W. Wisener
No. 143 — James K. Morrow
No. 144 — Cynthia Hornsby
No. 147 — William Corley
No. 148 — Robert Heath
No. 150 — Thomas Williams
No. 151 — Paul Bohannon

Appendix I

No. 153 — John Robbins
No. 155 — Willie Mitchell
No. 157 — Herman E. Robertson

2. The Transportation Director has complete authority to order subordinate supervisors and managers to cease and resist from "resolving" grievances in the manner described above and from otherwise using the grievance resolution process in a manner that undermines the competitive selection process required by Consent Decree I and the Court's various orders and injunctions enforcing such Decree.

3. The Transportation Director has refused to exercise his authority to prevent his subordinate managers and supervisors from violating the foregoing orders, injunctions and Decree by "resolving" grievances unilaterally at Stage I of the Grievance Procedure in the manner set forth above.

4. The plaintiffs have notified the defendants that such appointments, back-pay and salary increases violate the Decree and the Court's orders and Injunctions [See Order and Injunction of October 18, 1996 and July 11, 1996 (Docs. #1299 and #1300, #1131, #1132)] and requested that they not proceed any further in contempt of such Orders and Injunctions.

WHEREFORE, the plaintiffs request immediate entry of a temporary restraining order and/or preliminary injunction enjoining the defendants from further processing any grievance or resolution of a grievance involving appointment or reclassification to any position or

classification that has not been the subject of recruitment, posting, announcement, or a competitive selection process that fully complies with the prior orders, injunctions and Decree entered in this case.

Respectfully submitted,

s/ Robert L. Wiggins, Jr.
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APPENDIX J — DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION DATED MARCH 20, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

CIVIL ACTION NO. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF TRANSPORTATION, et al.,

Defendants.

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION

Defendant, Alabama Department of Transportation ("ALDOT"), submits the following response to plaintiffs' motion, treated by the Court as a permanent injunction and by implication plaintiffs contention that ALDOT is in contempt for violating prior injunctions of the Court. (3/10/97, Doc. no. 1636).

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A. IF ALDOT IS REQUIRED TO ADMINISTER THE REVISED GRIEVANCE PROCEDURE IN A RACE-NEUTRAL MANNER, HOW MAY THE CONSENT DECREE TO BE INTERPRETED SO THAT ONLY BLACKS ARE ENTITLED TO ARTICLE 20 RELIEF?

Pursuant to the Court's order and injunction of August 9, 1995 (Doc. no. 707), ALDOT is "ENJOINED and RESTRAINED from failing to comply with the revised grievance procedure, effective September 1, 1995." ALDOT must entertain grievances filed by non-black employees or be subject to contempt citations for failing to comply with the Court's order and injunction.

The revised grievance procedure clearly applies to all employees:

> ***GRIEVANCES.*** The Consent Decree and Departmental Policy mandate that *all employees* enjoy a work-place free from discrimination. The most effective accomplishment of the work of the Department requires prompt consideration and equitable adjustment of employee grievances involving discrimination.
>
> * * *
>
> ***DEFINITION OF COMPLAINT OR GRIEVANCE.*** A grievance is an alleged wrong based upon the employee's *race*, *color*, creed, sex, national origin, age, or handicap. Any matter

> concerning allegations of discrimination or a violation of the Consent Decree, or arising from or concerning matters that are the subject of the Consent Decree, will be admitted for adjustment.
>
> ***GRIEVANCE PROCEDURE.*** *Any* (a) *employee*, (b) employee who has been terminated, or (c) applicant for full-time employment, may register a grievance/complaint.

(Doc. no. 706) (Emphasis added). Based on the unambiguous language of the revised grievance procedure, plaintiffs' contention that the grievance process is available only to black employees is misplaced. Moreover, it is legally impermissible.

Race-neutral provisions of the consent decree cannot be applied in a race-conscious manner. In the Court's order approving Consent Decree I, the Court found "CONSENT DECREE I to be 'fair, adequate, and reasonable.' " *Reynolds v. Alabama Department of Transportation*, 1994 WL 899259 (M.D. Ala. 1994). This conclusion was based on agreement between all parties (plaintiffs, defendants, and intervenors) that "CONSENT DECREE I, as revised, contains only "RACE-NEUTRAL PROVISIONS.' " *Id.* Based upon this conclusion, the Court declined to "engage in strict-scrutiny analysis to determine if any RACE-CONSCIOUS RELIEF is legal." *Id.*

The Court is without jurisdiction to apply race-neutral provisions of the consent decree in a race-conscious manner because the " 'scope of a consent decree must be discerned

within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it' or by what 'might have been written had the plaintiff established his factual claims and legal theories in litigation.' " *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574, 104 S.Ct. 2576, 2585, 81 L.Ed.2d 483 (1984) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971)).

Heightened scrutiny is required. In the context of affirmative action plans, the Eleventh Circuit held that such plans "must not 'unnecessarily trammel[ ]' the rights of nonminority employees or 'create[ ] an absolute bar to their advancement.' " *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1500 (11th Cir. 1987) (citations omitted). The suggestion that race-neutral provisions of the consent decree are to be applied to benefit black employees and burden non-black employees creates further impermissible racial discrimination:

> By striving for racial parity rather than an end to racial discrimination, these decrees actually promote racial discrimination in contravention of the Constitution.

Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1570 (11th Cir. 1994). The inherent unfairness of the proposed race-conscious application of race-neutral provisions is quite clear. Numerous grievances, from both black and non-black employees, demonstrate the rampant unfairness and mistreatment of similarly situated employees that cannot be tolerated:

> The administrative convenience of such an approach [(choosing to make the color of the applicant's skin the sole relevant consideration in choosing among qualified applicants)] is far out-weighed by the burden borne not only by the officers rejected for promotion solely because of their race but by the African-American officers who have been stigmatized by these actions.

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207 (4th Cir. 1993).

B. ALDOT CANNOT BE HELD IN CONTEMPT FOR COMPLYING WITH ORDERS AND INJUNCTIONS ISSUED BY THE COURT.

Notwithstanding the right of non-black employees to file grievances under the revised procedures based on alleged acts of discrimination, the grievances of McCullough, D'Arville, and Grant implicate both the reclassification and provisional appointment processes. (Employee Complaints, ALDOT Doc. nos. 121, 122, and 123). The grievances, based entirely upon ALDOT's promotion of and award of backpay to Hudson Hinton, do not challenge the propriety of the award.[1] Grievants simply seek the same treatment. In

---

1. The grievances, which are identical, state:

> On April 11, 1994, my section supervisor, Jimmy K. Deas, wrote a letter to Mr. Don Arkle, Design Bureau Chief, recommending that five employees, Andrew

(Cont'd)

promoting Hinton and awarding him backpay, ALDOT complied with the order and injunction of the Court. (Doc. nos. 1299 and 1300). ALDOT took no action with regard to Hinton except the action ordered by the Court. The same is true of orders in the grievances of David Sims and James Foster. (2/4/97, Doc. no. 1512 and 2/12/97, Doc. 1533 and 1534). In each instance, ALDOT disputed the grievances and insisted that those grievants were being promoted (and backpay awarded) over similarly situated whites. (Infra, p. 9-10).

(Cont'd)

> McCullough, Hudson R. Hinton, David P. McAteer, John D'Arville and myself, be provisionally appointed to the classification for which each was performing the duties of at that time. (See attached letter).
>
> As a result of a recent court decision in the Reynolds vs Alabama Department of Transportation case, Mr. Hudson Hinton, a black employee, was awarded a provisional Civil Engineer II classification with backpay from April 1994 and other benefits. *I feel that I, along with the three other white employees, be given the same and equal treatment that Mr. Hinton was awarded* which includes a provisional appointment to the classification for which we were recommended in April 1994 with backpay and other benefits from that time.

(Emphasis added).

C. ALDOT'S AUTHORITY UNDER THE REVISED GRIEVANCE PROCEDURE IS NOT AN ISSUE. INSTEAD, THE CRITICAL QUESTION IS WHETHER WHITES ARE ENTITLED TO THE SAME RELIEF UNDER THE GRIEVANCE PROCEDURE AS BLACKS.

At the second step of the Revised Grievance Procedure, the investigator (the EEO monitor's designee) recommended, that grievants, McCullough, D'Arville, and Grant be awarded provisional appointments and backpay. Grievants accepted, in writing, the investigator's recommendations. This effectively resolved the grievance.

Plaintiffs now argue that ALDOT, had a right to, and should have objected. Assuming that ALDOT had objected and continued to object during the third step (mediation), the arbitrator in the fourth step of the revised procedure, could have mandated the same result. Thirty-four additional grievances similar to those being considered here, have now been filed, thirty-two by whites and two by blacks. (Footnote 2, infra). It is not unreasonable to assume that an arbitrator, sooner or later, will find that a white is entitled to provisional appointment and backpay. The right of ALDOT to object at Step 2 of the Revised Grievance Procedure is not the real issue. The real issue which this Court must address is whether relief for whites may be awarded under the procedure.

Appendix J

PLAINTIFFS HAVE WAIVED THEIR RIGHT TO OBJECT.

Plaintiffs' attorney agreed that these grievants be promoted. No effort was made by plaintiffs to continue the hearing at which the proposed resolution was presented to grievants. ALDOT filed its Motion to Dismiss and for Protective Order (1/14/97, Doc. no. 1477) prior to the hearing and specifically contacted plaintiffs' attorney advising of a potential settlement and seeking support for its motion. Plaintiffs' attorney insisted that it was ALDOT's problem. (1/15/97 Letter from Plaintiffs' counsel, Exhibit "A"). Nonetheless, another attorney in his office agreed to the promotions.

Plaintiffs' counsel has unique rights under the Revised Grievance Procedure. "Counsel for the class or his designee will have the right to participate in such meetings by attendance of telephone conference". (Revised Grievance Procedure, p. 7). Notice of such meeting at least three (3) days in advance of its occurrence is required. (Revised Grievance Procedure, p. 7). "In the event that class counsel deems the outcome of the arbitration to constitute a violation of Consent Decree I, class counsel may file a motion with (sic) for relief the court". Revised Grievance Procedure, p. 10. Moreover, the grievance procedure "shall not be construed to prevent attorneys for the plaintiff class in taking any action they deem necessary or appropriate on behalf of plaintiffs class, or any member thereof, separately from the grievance process". (Revised Grievance Procedure, p. 14). Plaintiffs, who had the standing and rights under the Revised

Grievance Procedure, exercised those rights in favor of promotions. They should not be permitted now to complain or object. Whatever rights they have were waived.

COMPLIANCE WITH CONSENT DECREE

The concerns identified in ALDOT's Motion to Dismiss Grievance and for Protective Order remain unresolved. The resolution of these grievances, as well as the grievances filed by Hinton, Sims and Foster, conflict with provisions of Consent Decree I. Certainly, Article 9, ¶ 6 and Article 15, ¶ 1(b) and 4 are implicated.

ALDOT recommended that McCullough and D'Arville be reclassified and that Grant be provisionally appointed. (See Exhibit "A" to Defendants Motion for Approval of Provisional Appointments, 3/12/97, Doc. no. 1561). But these reclassifications and provisional appointments remain under consideration by the Court. Indeed, ALDOT recommended David Sims for reclassification, but plaintiffs objected. (8/8/96, Doc. no. 1182). Instead, Sims was awarded a provisional appointment under the grievance procedure thereby going around whites and blacks similarly situated.

ALDOT does not dispute that provisional appointments for both blacks and whites are due to be made. Numerous grievances are currently pending that allege discrimination based on (1) race conscious relief being afforded to David Sims and James Foster to the exclusion of similarly situated black and non-black employees and (2) ALDOT's inability

to process reclassifications and provisional appointments under the Consent Decree because of plaintiffs' objections or the absence of an order addressing ALDOT's proposals.[2]

ALDOT is in a precarious position. On the one hand, ALDOT cannot refuse to adopt the settlement based on the recommendations of the investigator (or an order of the arbitrator) because ALDOT is enjoined to comply with the Revised Grievance Procedure. On the other hand, ALDOT is subject to a motion seeking a contempt citation (as

---

2. Sixteen grievances have been filed by black and non-black employees based on the Court's orders and injunctions in the grievances of David Sims and James Foster. (Eric English, doc. no. 132; George Rollins, doc. no. 134; Robert Camp, Jr., doc. no. 135; Charles Alexander, doc. no. 137; Robert Beason, doc. no. 138; Jeffrey Odom, doc. no. 139; Willie G. Frames, doc. no. 140; Gary Spears, doc. no. 141; William Corley, doc. no. 147; Robert Heath, doc. no. 148; Thomas Williams, doc. no. 150; Paul Bohannon, doc. no. 151; James McLeod, doc. no. 152; John Robbins, doc. no. 153).

Two of the grievances were filed by black employees. (Gabriel Roundtree, doc. no. 133; Horace Roundtree, doc. no. 136). An additional six grievances have been filed that allege racial discrimination stemming from ALDOT's inability to promote employees who are currently working out-of-classification while other employees have received promotions and backpay. (Bradley K. Wisener, doc. no. 142; James K. Morrow, doc. no. 143; Cynthia D. Hornsby, doc. no. 144; Robert Knowles, doc. no. 145; Kenneth Knowles, doc. no. 146; Anthony Channell, doc. no. 149).

An additional twelve grievances have been received, all from white employees. At this time, however, ALDOT has been unable to determine the nature of the complaints.

suggested by plaintiffs in their motion for a preliminary injunction, 3/10/97, Doc. no. 1635) for complying with the Revised Grievance Procedure with regard to these Grievants.

ALDOT DISPUTES PLAINTIFFS' SUGGESTIONS THAT IT WILL BE IN VIOLATION OF PREVIOUS COURT ORDERS AND INJUNCTIONS OF JULY 11, 1996 AND OCTOBER 18, 1996 (DOC. NOS. 1131, 1132 & 1299, 1300), IF THESE GRIEVANCES ARE RESOLVED IN FAVOR OF THE WHITES.

ALDOT forewarned the Court that it would be inundated with similar grievances if its motion seeking dismissal of the grievances and a protective order was not granted. (1/14/97, Doc. no. 1477). ALDOT vigorously objected to the Special Master's findings in the Sims' grievance that out-of-classification assignments violate Article 9, ¶ 6: "To award Sims a promotion as of the date of his 1994 Form 40 would allow him to obtain preferential treatment over all other ALDOT employees. . . . With hundreds of other ALDOT employees awaiting the Court's ruling on plaintiffs' objections to the implementation of the Form 40 reclassifications, it would be unfair to allow Sims to obtain his reclassification through this proceeding while requiring all others to continue waiting." (12/23/96, Doc. no. 1448, at 17-18).

Appendix J

BLACK PLAINTIFFS HAVE USED THE GRIEVANCE PROCEDURE TO GAIN ADVANTAGE IN PROVISIONAL APPOINTMENTS AND RECLASSIFICATIONS.

The unfairness of allowing end-runs around the provisional appointment process and the reclassification process mandated by the Consent Decree has created the situation existing today. Relief based on race-neutral provisions of the Consent Decree must be applied even-handedly. Both black and white employees are due to be reclassified or provisionally appointed. ALDOT has been singularly unsuccessful in its efforts to reclassify or provisionally appoint.

The very language employed by the Court in adopting the Special Master's recommendation in Sims demonstrates the facial validity of the numerous grievances now pending:

> Third, to comply with article XV, ¶ 4, the Department of Transportation was *obligated* either to work Sims within the HMT I classification he held, or to provisionally appoint him to the HMT II classification in which he was performing nearly 90% of his duties, so long as it was "practicable." Because the Department of Transportation did not choose the former, *it was obligated to comply with the latter.*

* * *

> Therefore, the court concludes that the Alabama Department of Transportation should have, and could have, "practicably" complied with ¶ 4 through the use of a provisional appointment of Sims to HMT II, but did not do so, in violation of the consent decree.
>
> * * *
>
> Sims has no obligation to show that the department acted in a discriminatory manner, but only that they failed to conform to the decree.

(2/4/97, Doc. no. 1512). (Emphasis added). The foregoing passage underscores the race-neutral nature of Article 15, ¶ 4 and Article 9, ¶ 6.

Defendants likewise objected to the relief recommended by the Special Master in the grievances of Hinton and Foster. The Court rejected ALDOT's argument that general compliance issues are not properly before the special masters. (10/18/96, Doc. no. 1299, at 10-11; 2/12/97, doc. no. 1533, at 12-13).

If Sims, Hinton, and Foster are entitled to provisional appointments, all employees recommended for reclassification and provisional appointment are entitled to identical relief. Race-neutral provisions of the consent decree require such action.

Appendix J

CONCLUSION

BASED ON THE FOREGOING, a permanent injunction should not be entered. Any injunction should be denied. The pending grievances are no different than the grievances filed by Hinton, Sims, and Foster.

The Court should, however, re-examine the Revised Grievance Procedure and modify it to allow ALDOT's participation in Step 2, eliminate Step 3, add arbitrators under Step 4 and allow *any party* the right to appeal to the Court if the result conflicts with the Consent Decree.

Respectfully submitted,

s/ Thomas R. Elliott, Jr.
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Appendix J

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Appendix J

EXHIBIT A

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* * *

VIA FAX AND MAIL

January 15, 1997

Mr. Robert Norris
London & Yancey
1000 Park Place Tower
2001 Park Place North
Birmingham, Alabama 35203

Dear Bob:

This is to follow up our conversations this morning during and immediately following the grievances of Andrew McCullough, Michael Grant and John D'Arville. As I stated previously, the plaintiffs adamantly oppose the provisional appointment of any of these individuals to positions which they seek through their grievances. If the Department follows Doug Furlow's recommendation in any of these grievances, it would violate Judge Thompson's orders in the grievances

of Hudson Hinton and Jessie Smith, as well as the Consent Decree. Therefore, plaintiffs request that the Department take all appropriate measures to prevent implementation of such recommendation. If the recommendation is implemented over our objection, we plan to file a motion to hold Mr. Furlow and others in contempt.

Sincerely,

s/ Robert L. Wiggins
Robert L. Wiggins

s/ C. Paige Williams
C. Paige Williams

cc: Mr. Michael Cooper, Esq. fax and mail
Thomas R. Elliott, Jr. fax and mail
Jim Ippolito fax and mail

APPENDIX K — MOTION TO DISMISS GRIEVANCES AND FOR PROTECTIVE ORDER DATED JANUARY 14, 1997

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

Civil Action No: 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF TRANSPORTATION, et al.,

Defendants.

MOTION TO DISMISS GRIEVANCES AND FOR PROTECTIVE ORDER

DEFENDANT, Alabama Department of Transportation ("ALDOT") moves the Court to dismiss the following grievances filed pursuant to the Revised Grievance Procedure provided for in Consent Decree I and approved by this court by orders dated August 9, 1995.

ALDOT shows that the attached grievances have been filed by Andrew McCullough (Employee Complaint, docket no. 121), John D'Arville (Employee Complaint, docket no. 122) and Michael Grant (Employee Complaint, docket no. 123). The grievances, which are identical, state:

Appendix K

> On April 11, 1994, my section supervisor, Jimmy K. Deas, wrote a letter to Mr. Don T. Arkle, Design Bureau Chief, recommending that five employees, Andrew McCullough, Hudson R. Hinton, David P. McAteer, John D. D'Arville and myself, be provisionally appointed to the classification for which each was performing the duties of at that time. (See attached letter).
>
> As a result of a recent court decision in the Reynolds vs Alabama Department of Transportation case, Mr. Hudson Hinton, a black employee, was awarded a provisional Civil Engineer II classification with backpay from April 1994 and other benefits. *I feel that I, along with the three other white employees, be given the same and equal treatment that Mr. Hinton was awarded* which includes a provisional appointment to the classification for which we were recommended in April 1994 with backpay and other benefits from that time.

Emphasis added. The letter mentioned in the first paragraph is included as part of each grievance.

The subject of each grievance is discrimination in the promotion of Hudson Hinton, a black member of Plaintiff class in this action. The Grievants are white employees of ALDOT. The provisional appointment of Mr. Hinton and his backpay were mandated by Order of this Court. (docket no. 1299). ALDOT has taken no action with regard to Mr. Hinton except the action ordered by the Court.

Appendix K

The first step under the Revised Grievance Procedure, applicable in this action, is to seek the recommendation of Grievants' supervisor or division Head. Here Grievants' supervisor stated:

> I cannot answer the question as to whether you are entitled to the same treatment as Mr. Hinton. I believe this question will need to be answered by the Transportation Director upon advice of legal counsel. It may even be necessary for the question to be answered by Judge Thompson.
>
> I, therefore, do not have any resolution to offer to you at this time and hereby recommend that your grievance be further processed.

The second step of the Revised Grievance Procedure is for the grievance to be investigated and a solution recommended. The investigator's findings were due January 10, 1997. On information and belief, the investigator will recommend that the Grievants be awarded a provisional promotion and backpay from April 1994. Furthermore, if such a solution is offered and accepted, ALDOT will be bound to promote the Grievants and award backpay.

As grounds for its motion, ALDOT states:

1. These grievances are based upon an Order of this Court which should not be subject of a grievance.

2. Grievants have no standing to file these grievances.

3. ALDOT should not be subjected to a grievance for following an Order of the Court. Stated differently, ALDOT should be insulated or immune from the grievance procedure for acts performed under Order of this Court.

4. Relief sought in the grievances is barred under 42 USC 2000 e-2(N).

5. If these grievances are allowed, the Court will, in effect, allow employees of ALDOT to question or challenge orders of the Court collaterally and not be subjected to the appeals process to which ALDOT is bound.

6. ALDOT will be subject to inconsistent relief and inconsistent standards if acts performed under Orders of this Court are subject to the grievance procedure.

7. ALDOT will be subject to further grievances of a similar nature if this Court recognizes a right to grieve an action ordered by this Court.

ALDOT further requests that this Court issue a protective order protecting ALDOT from further grievances or actions by any class member or other party over whom this Court has jurisdiction:

1. If these grievances are not dismissed.

2. If further grievances are filed based on acts by ALDOT in performing any other orders of the Court in this action.

Appendix K

Respectfully submitted,

s/ Thomas R. Elliott, Jr.
Thomas R. Elliott, Jr.
Alabama State Bar Number:
416-46-1499
Lisa W. Borden
Alabama State Bar Number:
266-75-5673
C. Dennis Hughes
Alabama State Bar Number:
422-19-1033

Attorney for Defendants

Of Counsel:
LONDON & YANCEY, L.L.C.
1000 Park Place Tower
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(205) 251-2531

APPENDIX L — REVISED COMPLAINT PROCEDURE DATED AUGUST 8, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

CV 85 T 665 N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF TRANSPORTATION, et al.,

Defendants.

REVISED COMPLAINT PROCEDURE

Pursuant to the Court's order, defendant Alabama Department of Transportation submits the following revised complaint procedure:

NOTICE: THIS REVISED PROCEDURE REPRESENTS A SUBSTANTIAL CHANGE FROM THE PRIOR PROCEDURE, AND CONTAINS SIGNIFICANTLY DIFFERENT DEADLINES FOR TAKING ACTIONS NECESSARY FOR THE PROCESSING OF GRIEVANCES. PLEASE READ THIS PROCEDURE CAREFULLY.

Appendix L

GRIEVANCES. The Consent Decree and Departmental Policy mandate that all employees enjoy a work-place free from discrimination. The most effective accomplishment of the work of the Department requires prompt consideration and equitable adjustment of employee grievances involving discrimination. It is the desire of the Department to adjust grievances informally, and both supervisors and employees are expected to make every effort to resolve problems as they arise. However, it is recognized that there will be grievances which will be resolved only after formal appeal and review. A grievance shall be properly commenced by submitting it on an official form, signed by the grievant, within the time limit set out below. A grievance so filed shall be processed in accordance with the following provisions of this section. Within the time limits allowed for the pending step or action, any requests for extension of any time limit herein may only be granted by the Director or his designee.

DEFINITION OF COMPLAINT OR GRIEVANCE. A grievance is an alleged wrong based upon the employee's race, color, creed, sex, national origin, age, or handicap. Any matter concerning allegations of discrimination or a violation of the Consent Decree, or arising from or concerning matters that are the subject of the Consent Decree, will be admitted for adjustment. Complaints not involving allegations of discrimination or matters that are the subject of the Consent Decree shall not be adjusted under this Rule.

GRIEVANCE PROCEDURE. Any (a) employee, (b) employee who has been terminated, or (c) applicant for full-time employment, may register a grievance/complaint. Grievants are assured of freedom from restraint, interference,

discrimination or reprisal for presenting a grievance. The grievant may be represented by counsel of his choosing throughout the grievance process.

STEP I. (1) The grievance, to be properly commenced, must be submitted on an official grievance form to the immediate supervisor within 90 days of the alleged incident. Provided, however, that if the complainant's immediate supervisor is a subject of the grievance, then a grievance may be properly commenced by submitting a grievance form to the Division EEO representative. Official grievance forms must be readily available to all employees and applicants. A copy of the complaint must be filed with the EEO Monitor and the attorney for the plaintiff class within Two (2) working days to be docketed and logged. Grievances or complaints received by plaintiffs' counsel shall be forwarded to the EEO Monitor or his designee within Three (3) working days of receipt by such counsel, and grievances received by the EEO Monitor or his designee will be forwarded to plaintiffs' counsel within Three (3) working days from receipt of such grievance. A copy of the complaint must be provided by the EEO Monitor to any employee made the subject of the grievance. All such complaints, to the

best of the grievant's ability, shall cite with specificity the reason for and nature of the complaint. A grievant is not to be harassed, nor is any adverse action to be taken against a grievant, for having filed such grievance.

(2) Within Five (5) working days of receipt of the grievance, the immediate supervisor shall reply to the aggrieved employee in writing on an official form. Should the immediate Supervisor be named as the subject of the Complaint, then the Head of the Division, Bureau, or Section, or his designee, shall reply in writing to the complaining party within the specified time. Copies of his reply shall be furnished to any employee made the subject of the grievance and to the EEO Monitor within the same time frame. Verbal discussions of the grievance between the aggrieved employee, his supervisor and Division Head are encouraged so long as the grievant is permitted to have the EEO Monitor or other designee in attendance; however, such discussions do not excuse the written reply required under this section.

(3) In lieu of replying, the immediate supervisor may elect to refer the complaint to the Division Head within

the time period for reply. The Division Head must acknowledge receipt of the grievance in writing to the aggrieved employee and to the EEO Monitor not later that the next business day after receipt of the referred grievance.

(4) Should the supervisor or Division Head not return an answer on official forms within the established time limits, the grievance shall be deemed to be well founded and the grievant may proceed to file at the next step within the time limit outlined below.

(5) The EEO Monitor shall maintain a daily log listing the date and time of each grievance received, assigning each a docket number to be used throughout its processing for identification and monitoring purposes, assigning an investigator responsible for processing such grievance, and setting forth a schedule of deadlines for such processing that is consistent with the times prescribed in this procedure. Plaintiffs' counsel shall be given written notice of each such grievance, docket number, assigned investigator, and schedule of deadlines within Three (3) working days of receipt of each grievance by the EEO Monitor.

Appendix L

STEP II. If the grievant has not signed a written acceptance of the proposed resolution, the grievance will automatically be submitted, within Five (5) working days of the last action required under Step I, to the EEO Monitor for a formal investigation into the alleged wrongdoing. The EEO Monitor, or his designee, shall reply to the grievant within Seven (7) working days, and submit Findings of the investigation, in writing, on an official form signed by the EEO Monitor, or his designee. A copy of the Investigative Findings by the EEO Monitor shall be furnished to the Division Head, the subject of the investigation, the attorney for the plaintiff class, and any other legal representative involved at this point.

Within Ten (10) days after receipt of the grievance by the EEO Monitor or his designee, a meeting shall be heard between the EEO Monitor or his designee and the grievant at which time a written answer and proposed resolution to the grievance will be given to the aggrieved party. If the aggrieved Party so chooses, he may have a co-employee present at the meeting. Counsel for the class or his designee shall have the right to participate in such meetings by

attendance or teleconference. Said counsel shall be given notice of such meeting at least Three (3) days in advance of its occurrence.

STEP III. (1) If the grievant has not signed a written acceptance of the proposed resolution, The grievance will be automatically submitted, within Five (5) working days of the Step II meeting, to the Hearing Officer.

(2) A Hearing Officer, next in order from a list of such Hearing Officers previously agreed upon by the Transportation Department counsel for the plaintiff class, shall serve as Hearing Officer, provided that the Hearing Officer is willing and available to serve in this capacity.

(3) **HEARING PROCEDURES FOR HEARING OFFICER.** The Hearing Officer shall convene a formal hearing within Thirty (30) working days after selection, subject to the right of the Transportation Department, counsel for the plaintiff class, or Hearing Officer to extend such time for an additional period of no more than Thirty (30) days. After a formal hearing, the Hearing Officer shall render findings of fact and a

recommendation to the Highway Department within Ten (10) calendar days of the completion of taking testimony and evidence. The Department shall implement the recommendations of the Hearing Officer unless an appeal is taken to Step IV.

STEP IV. If the Complaint or Grievance has not been resolved to the satisfaction of both parties pursuant to Step I, II and III then either party may appeal to an external arbitrator. Such arbitrator shall be selected from a panel of Seven (7) arbitrators, with Three (3) of such panel members to be designated by class counsel. Three (3) to be designated by the Department and One (1) to be designated by agreement among the other Six. Selection of the arbitrator shall be accomplished by alternate strikes from the panel. Notice of the appeal shall be served to the panel and the other party within Ten (10) working days of Step III completion. The arbitrator shall set the appeal down for hearing, serving notice to the complaining party along with the appropriate respondent, the attorney for the plaintiff class, and any legal counsel of record in any of the prior proceedings. The findings and orders of the arbitrator shall be final from which no appeal may

be taken in the context of the *Reynolds* case. Nothing in this procedure, however, shall be construed to prevent the filing of any administrative charge or separate legal action. In the event that class counsel deems the outcome of the arbitration to constitute a violation of Consent Decree I, class counsel may file a motion with for relief the Court.

RELATED PROVISIONS

1. The Director shall provide such administrative services as may be necessary and shall exercise his authority to require the production of records or appearance of witnesses as may be required to carry out the provisions of this Rule.

2. Failure of the grievant to appear for any scheduled hearing or to comply with any requirement set forth herein shall be deemed to mean that the grievance has been resolved.

3. In the event that a grievance is filed by a person who, within the immediately preceding twelve months, has filed three or more other grievances that have been deemed frivolous in the final step to which they proceeded, such grievance shall not proceed through the grievance process under it has been reviewed as follows:

   (a) The grievance shall be forwarded to the class counsel and the Department's

designee for review. If both such parties deem the grievance frivolous, such grievance shall be denied without further proceedings.

(b) If either Party deems the grievance non-frivolous after the review called for in subparagraph (a), it shall continue through the grievance process as otherwise required above.

4. Any written resolution of the complaint signed by the grievant will serve to terminate any other proceedings involving the same complaint, so long as the written resolution gives notice of this effect to the grievant.

5. Copies of this grievance procedure, together with copies of the official grievance form, are to be distributed to class members. This distribution is to be accomplished by (a) posting copies at all ALDOT facilities, (b) inserting copies of the procedure with all employee paychecks as soon as practicable after the procedure is implemented, and (c) providing a copy of the procedure to each newly hired employee. Postings must be conspicuous and must be made in the place ordinarily used for posting of announcements. Applications for employment with the Department shall contain a conspicuous statement notifying applicants of the existence and availability of the grievance process.

6. Any employee who is required to attend hearings or meetings under this procedure, either as a grievant or as a witness for a grievant, shall be paid at his or her regular rate of pay for such time; provided, however, that an employee whose grievance is deemed to be frivolous at the last step to which it proceeds shall not be entitled to be paid for his or her time spent in grievance proceedings.

7. Nothing in this procedure shall be construed to prejudice the rights of persons whose grievances had already been filed, or had arisen but had not yet been filed, prior to the effective date of this procedure. Grievances already filed prior to the effective date shall continue to be processed in accordance with prior procedures, unless all parties agree to be bound by this procedure. Persons whose grievances arose, but had not yet been filed, prior to the effective date of this procedure, shall not be bound by the requirement for time of initial filing as set forth in Step I above. Instead, such persons may timely file such grievances within (a) the remaining time they would have had for filing under the prior procedure; or (b) Ninety (90) days from the effective date of this procedure, whichever is shorter.

8. Nothing in this procedure shall be construed to prevent attorneys for the plaintiff class from taking any action they deem necessary or

appropriate on behalf of the plaintiff class, or any member thereof, separately from the grievance process.

s/
BERT S. NETTLES
SS# 424-48-5850
LISA W. BORDEN
SS# 266-75-5673

Attorneys for Defendant
Alabama Department of
Transportation

OF COUNSEL:

LONDON & YANCEY
1000 Park Place Tower
2001 Park Place North
Birmingham, Alabama 35203
(205) 251-2531

APPENDIX M — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION DATED AND FILED JULY 5, 1995

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

ORDER

This cause is now before the court for a determination on how to handle grievances filed against the Alabama Department of Transportation pursuant to a grievance procedure filed with the court on June 26, 1995 (Doc. no. 643).

The grievance procedure currently in operation was developed by the defendants pursuant to Article XIX, ¶ 7 of Consent Decree I (Doc no. 553). The current grievance procedure requires, among other things, that the court hear

appeals by grievants. The defendants, at the court's request, are in the process of developing a revised grievance procedure that will not involve the court in hearing appeals.

By agreement of the parties, it is ORDERED that all grievances that are filed with the court before the court approves a revised grievance procedure will be handled under the following procedure, which is similar to that used with United States Magistrate Judges under 28 U.S.C.A. § 636(b)(1):

(1) The court will appoint a master or masters to conduct evidentiary hearings on the grievances. The fees and expenses of the master or masters will be paid by defendant Alabama Department of Transportation.

(2) The master will submit to the court proposed findings of fact and recommendations for disposition of the grievances. The master will file the proposed findings and recommendations with the court and a copy will be mailed to all parties.

(3) Within ten days after being served with a copy, any party may file written objections to such proposed findings and recommendations as provided by rules of court.

(4) The court will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the master. The court may also receive further evidence or recommit the matter to the master with instructions.

Appendix M

It is further ORDERED that, unless an objection is received by July 14, 1995, the court will assume that it has correctly summarized the agreement of the parties and that the parties have no objection to the procedures outlined above.

DONE, this the 5th day of July, 1995.

s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

APPENDIX N — NOTICE OF SUBMISSION OF COMPLAINT PROCEDURE DATED JUNE 21, 1995 AND FILED JUNE 22, 1995

IN THE
UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NUMBER:
CV 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF TRANSPORTATION, et al.,

Defendants.

NOTICE OF SUBMISSION OF COMPLAINT PROCEDURE

Pursuant to the Court's order of June 19, 1995, plaintiffs come and submit the attached complaint procedure which was agreed upon by the respective counsel of the counsel of the above-referenced case.

Appendix N

Respectfully submitted,

By: s/ C. Paige Williams
C. Paige Williams

OF COUNSEL:
GORDON, SILBERMAN, WIGGINS & CHILDS
1400 SouthTrust Tower
Birmingham, Alabama 35203
(205) 328-0640

Appendix N

COMPLAINT PROCEDURE

Any differences arising between any applicant or employee of the Highway Department in regard to the provisions of this Decree, including the general prohibition of racial discrimination, shall be submitted pursuant to the following procedure:

1. Any person wishing to initiate the grievance procedure must present a written grievance to the EEO Monitor or his designee (for which there shall be at least one in each Division of the Highway Department) or to the plaintiffs' counsel, within one hundred eighty (180) days of the date of the grievable act.

2. Grievances or complaints received by plaintiffs' counsel shall be forwarded to the EEO Monitor or his designee within three (3) working days of receipt by such counsel, and grievances first received by the EEO Monitor or his designee will be forwarded to plaintiffs' counsel within the three (3) working days from receipt of such grievance.

3. The EEO Monitor shall maintain a daily log listing the date and time of each Grievance received that day, assigning it a docket number to be used throughout its processing for identification and monitoring purposes, assigning an investigator responsible for processing such Grievance, and setting forth a schedule of deadlines for such processing which shall be consistent with the times prescribed in this procedure. Plaintiffs' counsel shall be given written notice of each such Grievance, docket number, assigned investigator and schedule of deadlines within three (3) days of receipt of each Grievance by the EEO Monitor.

Appendix N

4. Within ten (10) days after receipt of the grievance by the EEO Monitor or his designee, a meeting shall be held between the EEO Monitor or his designee and the grievant at which time a written answer and proposed resolution to the grievance shall be given to the grieving party. If the grieving party so chooses, he may have a co-employee present at the meeting. Counsel for the class or his designee shall have the right to participate in such meetings by attendance or teleconference. Said counsel shall be given notice of such meeting at least three (3) days in advance of its occurrence.

5. Unless the Grievance is resolved at the meeting to the satisfaction of the grieving party and he so indicates on the written forms which will be provided to him at said meeting, the grievance, the response and the proposed resolution will automatically be sent to the attorney for the class and the attorney for the Highway Department within two (2) days of the meeting.

6. Within ten (10) working days after receiving said grievance and response from the EEO Monitor, the attorneys for the plaintiffs and defendants will attempt to resolve the Grievance to the satisfaction of the grieving party and the EEO Monitor or his designee.

7. If the grieving employee is not satisfied with the attorneys' proposed resolution, or if no resolution is proposed within thirty (30) days of the initial filing of the Grievance, he may file with the Court, within forty (40) working days of the initial filing of the Grievance, a written notice of his intent to submit his grievance to the Court for resolution.

Appendix N

A form which can be utilized by the grievant to appeal his grievance to the Court will be provided to the grieving employee within thirty (30) days of the initial filing of his Grievance.

8. In order to have standing to file a grievance, the grieving party must be the employee who is directly affected by the act or actions of the Highway Department which are the subject of the grievance. No persons shall have standing to pursue a grievance for another employee.

9. The grievant, if he/she prevails, and all witnesses for the grievant, who are employees of the Highway Department, will be paid for their time in testifying at any meeting or hearings.

10. Nothing contained in this Complaint Procedure shall apply to the attorneys for the class or to any issue sought to be raised by such attorneys on behalf of any member of the class or the class as a whole. Such attorneys shall have the right to challenge any noncompliance with the Decree or racial discrimination, or to seek further relief pursuant to the Consent Decree, without regard to the requirements of this Complaint Procedure.

11. The defendants will post notice of the Grievance Procedure in prominent places likely to come to the attention of members of the class on a regular basis and shall maintain such posted notice during the life of the Consent Decree in this action. Before the effective date of the Decree, or any part thereof, the defendants will provide a copy of this Order to all employees of said Highway Department at the time of

distributing their paychecks or at such other convenient opportunity. The parties to this Decree will cooperate in devising the necessary forms to implement the Complaint procedure and shall have such forms completed for use by the effective date of the Decree.

APPENDIX O — ORDER AND INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION DATED AND FILED AUGUST 9, 1995

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

ORDER AND INJUNCTION

This cause is now before the court for approval of a revised grievance procedure for the Alabama Department of Transportation. A grievance procedure is required under Article XIX, ¶ 7 of Consent Decree I (Doc. no. 553). The Department submitted a proposed revised grievance procedure on August 9, 1995 (Doc. no. 706).* Counsel for the plaintiffs have informed the court they agree to that procedure.

---

* Similar documents were filed on August 4, 1995 (Doc. no. 699) and August 1, 1995 (Doc. no. 686). These two documents are now superseded.

Appendix O

Accordingly, it is ORDERED that:

(1) The proposed revised grievance procedure, filed by defendant Alabama Department of Transportation on August 9, 1995 (Doc. no. 706), is adopted.

(2) Defendant Alabama Department of Transportation is ENJOINED and RESTRAINED from failing to comply with the revised grievance procedure, effective September 1, 1995.

DONE, this the 9th day of August, 1995.

s/ Myron H. Thompson
UNITED STATES DISTRICT
JUDGE

MOTION FILED

APR 19 2001

Supreme Court, U.S.
FILED

APR 19 2001

CLERK

(3)

No. 00-1438

IN THE

Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,
Petitioners,

and

CECIL PARKER, *et al.*,
Petitioners,

v.

G.M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL BAR ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The National Bar Association ("NBA") respectfully moves for leave to file this Brief as *amicus curiae* supporting the petition. This motion and brief are filed within the time allowed by Supreme Court Rule 37.2(b); this Court, upon the request of some Respondents, has extended the time for filing briefs in opposition to May 15, 2001 (though Respondents subsequently decided to waive their right to file such briefs). The NBA is the oldest and largest bar association in this country composed primarily of African-American attorneys, judges, legal educators and law students. During its 75-year history, the NBA has participated as *amicus curiae* many times before this Court, as well as other federal courts.

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INTEREST OF THE MOVANT [1]

The interest of The National Bar Association ("NBA") here is as follows.

First, this case arises in a litigation context which has been very close to the heart of the NBA and many of its members over its long history: the administration of federal injunctions and consent decrees, in institutional litigation challenging race discrimination. Many members of the NBA have decades of experience as counsel for plaintiffs in institutional reform litigation, which will allow them to shed light on the issues in a way which should prove helpful to this Court. In more recent years, members of the NBA have also represented governmental entities and other defendants in this sort of litigation; and this experience, we respectfully submit, will allow the NBA's brief to reflect a balanced approach which will prove all the more helpful to the Court. Second and more broadly, regardless of the clients which its attorney members are representing or the causes they are pursuing, a vast number of the NBA's members are frequent and experienced practitioners in federal courts. Thus they, and the NBA, have an important interest in ensuring that the law governing the resolution of disputes in federal courts is clear, uniform, and fair.

On a more case-specific level, the NBA also has an interest in standing up for the learned U.S. District Judge (an NBA member), whom the Eleventh Circuit erroneously criticized and whose actions the Eleventh Circuit incorrectly described.

---

[1] This brief was not written in whole or in part by counsel for a party, and no one other than the NBA, its members, and its counsel made a monetary contribution to its preparation or submission.

Consent for the filing of this brief was sought, but was withheld by all Respondents.

SUMMARY OF THE ARGUMENT

Each of the Questions Presented is of considerable importance to the administration of justice in federal courts, going well beyond the immediate context of this case.

The first question, regarding the scope of a District Court's authority when overseeing a consent decree, brings to this Court a crucial issue of federal law. The Eleventh Circuit's rule is now that a District Court overseeing a consent decree can modify that decree in order to make it weaker or abolish it altogether, but (under the decision in this case, apparently) cannot modify a decree even slightly for the purpose of saving it from internal conflict, manipulation, evasion, or obsolescence. Other Circuits reject such a limitation on the modification power. This is a critical question which will recur frequently in some of the most important litigation of our time, and which calls out for uniformity which can only now come from this Court. The NBA submits that the Eleventh Circuit's view is wrong because (among other reasons) it conflicts with relevant decisions from this Court and would deter settlement of major cases.

The second question, regarding the Eleventh Circuit's *sua sponte* call for possible sanctions on plaintiffs' counsel, is of vital importance to all practicing attorneys. There is one aspect of the Eleventh Circuit's decision in this regard which (in the NBA's view) deserves special scrutiny: the Eleventh Circuit has publicly excoriated plaintiffs' counsel, and threatened them with sanctions, for taking a position *with which the District Court agreed.* If this precedent is allowed to stand, then the zealous advocacy of all lawyers in all sorts of litigation will be chilled. Again, this is an area of law which needs uniformity; and it is an area in which the NBA feels strongly that the Eleventh Circuit has erred.

The third and fourth questions, in the NBA's view, are of major importance even though the answers are clear-cut. It

may well be necessary for this Court to reiterate the settled answers to these questions in the course of addressing the other questions presented in this case; the Eleventh Circuit's opinion appears to depart from those settled principles.

ARGUMENT

Each of the questions presented is of considerable importance to the administration of justice in federal courts, going well beyond the immediate context of this case. These are questions to which all members of the civil litigation bar—regardless of what clients they represent or what causes they pursue—need clear and uniform answers. And they are questions on which the lawful interests of all members of the bar, of the federal judiciary, and of the public would be better served by reversal of the Eleventh Circuit's decision.

1. As to Question 1, Vitally Important Questions are Presented Regarding the Scope of a District Court's Authority When Administering a Consent Decree.

Question 1 raises crucially important questions about the tools at a District Court's disposal when administering and overseeing an ongoing consent decree. The issue arises because the consent decree in this public employment discrimination case provided for a race-neutral competitive process for filling positions (*Reynolds v. ALDOT*, 996 F.Supp. 1130, 1132, 1136-37 (M.D. Ala. 1998)), and also provided for the adoption of a grievance procedure (*id.* at 1144 n.40). The District Court, in the order giving rise to Question 1, granted declaratory relief to the effect that the grievance procedure could not be used to fill positions outside of the mandated race-neutral competitive process. *Id.* at 1156. The reason—as grasped by the District Court, the plaintiff class, and also apparently the defendants, *id.* at 1137, 1138, 1155—was that without such a limit on the use of the

grievance procedure, a series of friendly grievance "settlements" could render the mandated competitive process a dead letter. *Id.* at 1139, 1141, 1151-52, 1154-55, 1156. In other words, the declaratory relief was issued because without it, the consent decree itself would become nugatory due to this unforeseen clever use (or abuse) of the grievance procedure.[2] The Eleventh Circuit reversed, holding that this was beyond the authority of the District Court. The Eleventh Circuit criticized the District Court's action as a forbidden act of "rewriting" a consent decree. *Reynolds v. Roberts*, 207 F.3d 1288, 1300-01 (11th Cir. 2000).

There are two potential ways of reading the proceedings below and the Eleventh Circuit's decision in this case. This potential ambiguity, however, does not counsel against certiorari; for on either possible reading, the Eleventh Circuit's decision creates a Circuit split on an important point of federal law.

Petitioners offer one reading of the case, and as they are of course more familiar with the record than is the NBA, the NBA must defer in large part to their reading. Petitioners do not, it seems, embrace the Eleventh Circuit's assertion that the District Court was "rewriting" the decree. Petitioners' view, instead, is that the District Court granted declaratory relief about the administration of the decree, pursuant to its authority under the decree. Under this view, an important Circuit split is presented as to whether courts overseeing consent decrees may issue such declaratory orders, or whether their powers are strictly limited to the issuance of contempt sanctions for violations of specific decree provisions. The NBA agrees that the Circuit split identified

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[2] The District Court was clear that it was *not* ruling that the availability or scope of the grievance procedure would depend on the race of the grievant. *Reynolds*, 996 F.Supp. at 1149. It is unclear why the Eleventh Circuit described the District Court as having done that (*Reynolds*, 207 F.3d at 1297 n.18); the District Court did not.

by the Petition on this issue is of vital importance, that it will recur frequently in major litigation of various sorts, and that it deserves this Court's scrutiny. The NBA, in order to avoid redundancy, will not repeat all that the Petitioners have said to prove the existence of the Circuit split on this point. This lack of redundancy should not be mistaken for disagreement.

But the NBA also points out, as *amicus curiae*, that an equally important but slightly different Circuit split is also fairly encompassed within the Petition, even on the other potential reading of the case—that is, even if one embraces the Eleventh Circuit's view that the District Court was actually "rewriting" the decree. *Reynolds*, 207 F.3d at 1300-01. "Rewriting", in this context, is simply a pejorative word for "modifying". So, the Eleventh Circuit's decision in this case (if it is read to include any discernible holding to govern future cases) on this reading means that District Courts cannot modify consent decrees—at least that they cannot do so where (as here) the so-called "modification" is an effort to ensure that the consent decree remains vital, that it is not manipulated into obsolescence or evaded, and that it does not contain the seeds of its own destruction. But other Circuits take a very different view, expressly allowing modification of consent decrees. *See, e.g., U.S. v. Western Electric*, 894 F.2d 430, 434 (D.C. Cir. 1990) ("There are normally two modes of decree administration available to a district court. The first is interpretation of a decree. . . . The second means of administering a consent decree is through modification. A district court may adjust the obligations of the parties . . .").

The Circuit split caused by the Eleventh Circuit is even a bit more pointed, because even after its decision in this case, that Circuit has reaffirmed the judicial authority to modify consent decrees, in the context of a *defendant's* request for a modification which would *reduce* its obligations under the decree. *See Florida Ass'n for Retarded Citizens v. Bush*,___F.3d___, 2001 U.S. App. LEXIS 5448, *6-*7 (11th

Cir. 2001). Therefore, unless the Eleventh Circuit's decision in this case is to be seen as a unique one containing no discernible holding to govern future cases (which is certainly an arguably correct view, but the possibility of this argument provides little comfort to any member of the bar), the rule in the Eleventh Circuit is now that District Courts can modify consent decrees *only* at *defendants'* urging in order to make decrees *weaker*, and that they cannot modify decrees at *plaintiffs'* urging in order to ensure that the decrees remain forceful in light of unforeseen or changing circumstances.

Such a double standard for decree modification, the NBA submits, is inconsistent with *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380-81 (1992), in which this Court held that

> [t]he upsurge in institutional reform litigation since *Brown v. Board of Education*, 347 U.S. 483 (1954), has made the ability of a district court to modify a decree in response to changed circumstances all the more important. . . . The experience of the District and Courts of Appeals in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation.

See Supreme Court Rule 10(c) (listing, among situations in which certiorari is appropriate, those cases in which a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court."). In addition, the Eleventh Circuit's double standard creates a stark split in the Circuits, because least two other Circuits have held—in this year alone—that District Court's modification power under *Rufo* is *not* limited to modifications which are sought by defendants or which make consent decrees weaker. *David C. v. Leavitt*,___F.3d___, 2001 U.S.App. LEXIS 3571, *12-*14 (10th Cir. 2001); *U.S. v. Secretary of HUD*, 239 F.3d 211, 216 n.5 (2d Cir. 2001) ("[M]odifications . . . that increase the obligations imposed by

a consent decree are also permissible. *See also United States v. Western Elec. Co.*, 310 U.S. App. D.C. 281, 46 F.3d 1198, 1202 (D.C. Cir. 1995) (noting that 'at the request of the party who sought the equitable relief, a court may tighten the decree in order to accomplish its intended result')"). *See* Supreme Court Rule 10(a) (certiorari warranted where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

This is truly an issue that needs to be addressed by this Court: whether a District Court can modify a consent decree *only* to *reduce* the decree's requirements, and *not* in order to keep the decree alive in light of experience or changed circumstances. This issue will arise frequently in some of the most important federal cases of our time, especially in civil rights cases, antitrust cases, and other categories of cases which frequently result in consent decrees. This case is a very good vehicle to address the issue, because the "modification" (such as it was) of the decree was a rather mild one. It can hardly even be said that it imposed any new obligation on anyone; instead, it merely placed a limitation on a grievance process which the decree itself had created, in order to avoid an internal conflict within the decree itself. In addition, the justification for the mild "modification" was overwhelming; unless "modified", the decree contained the unforeseen seed of its own destruction. The question of the scope of a District Court's authority in these matters, therefore, is presented in a pure and distilled form.

Among the many reasons to reject the Eleventh Circuit's rule, the NBA for now emphasizes only the following, as this reason also counsels in favor of a grant of certiorari: the Eleventh Circuit's rule would deter settlements in institutional reform cases and other major cases. If the reality of post-*Rufo* jurisprudence is the Eleventh Circuit's downward-ratchet effect—such that consent decrees can be

modified only in order to make them *weaker* but not to save them from obsolescence, evasion or manipulation—then plaintiffs will be well-advised to avoid consent decrees and to seek litigated decrees instead. In short, the Eleventh Circuit's rule makes consent decrees unattractive, and thus deters settlement of major cases. This in itself is a matter of enormous significance for the public, for the courts, and for government at all levels.

2. As to Question 2, the Eleventh Circuit's Decision Will Interfere Intolerably With the Duty of Zealous Advocacy Which All Lawyers Owe Their Clients.

Question 2 relates to the extent of the authority of the Court of Appeals, acting *sua sponte*, to declare the actions of plaintiffs' counsel to have been an "abuse of judicial process" warranting sanctions under 28 U.S.C. § 1927. The NBA submits that this is a vital question, made all the more important by the fact that the Court of Appeals has criticized and called for sanctions upon plaintiffs' counsel *for taking a position with which the District Court agreed.* The appellate court's call for sanctions for taking a winning position below, if not corrected by this Court, will upset the careful balance which has heretofore been struck between sanctioning frivolous arguments and fostering zealous advocacy. This is an issue which affects literally ever litigating attorney, and every party, in every federal case. It is "an important question of federal law that" to the NBA's knowledge "has not been, but should be, settled by this Court." Supreme Court Rule 10(c).

The Eleventh Circuit invoked 28 U.S.C. § 1927 with regard to the motion filed by plaintiffs' counsel seeking preliminary injunctive relief against the granting of certain specific promotions, pending resolution of the issue on a broader and more permanent basis. *Reynolds,* 207 F.3d at 1301-02

(invoking § 1927 as to this preliminary injunction, while declining to invoke it with regard to the later proceedings which gave rise to the declaratory order discussed in Section 1 of this Brief). That motion by plaintiffs was *granted* by the District Court (*see id*). The Eleventh Circuit vacated the preliminary injunction—and called the motion an abuse of the judicial process, *id.* at 1299—because (according to the Court of Appeals) no member of the plaintiff class stood to be injured by the challenged promotions. *Id.* But the District Court, in agreeing with plaintiffs' counsel that their motion was well-taken, had expressly concluded that there *was* injury to the plaintiff class from the denial of a fair opportunity to compete. *Reynolds*, 996 F.Supp. at 1152. Thus, the Court of Appeals has invoked § 1927 to sanction counsel for taking a position which the District Court had expressly agreed with.

Thus far, the law of sanctions has been carefully crafted in order to leave breathing room for zealous and even creative advocacy, such that a lawyer will feel comfortable making even a novel argument if some reasonable minds might accept it. That is, for instance, the very meaning of Rule 11's recognition that attorneys are free to argue for new law or the overruling of old law so long as the arguments are "non-frivolous". *See* Fed. R. Civ. P. 11(b)(2). The Rule's drafters explicitly warned that it "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Advisory Committee Notes, 1983 Amendment. More recent amendments have preserved this balance, noting that this aspect of Rule 11 is directed towards the prohibition of "patently frivolous" arguments, and counselling that a court considering sanctions for a legal argument should give due regard for the existence of support for the novel theory even in such out-of-the-way places as "minority opinions, law review articles, or . . . consultation with other attorneys." Advisory Committee Notes, 1993 Amendments. Under the Eleventh Circuit's approach that breathing room for zealous and creative advocacy no longer exists, at least not with the

certainty which is the sine qua non of real breathing room. Even if a reasonable mind *sitting on the U.S. District Court* accepts a lawyer's reasoned argument, in the Eleventh Circuit there is still the risk of sanctions.

The NBA also submits that one of the reasons not to allow the Courts of Appeals to sanction lawyers for the making of arguments which *prevail* in the District Courts, is that lawyers thus become innocent casualties in jurisprudential battles among judges. This case, it seems to the NBA, is an example of the phenomenon. The Eleventh Circuit's opinion, it must be candidly noted, takes a very hostile stance towards the District Court. This hostility is manifested not only in the Eleventh Circuit's language [3] but also in its actions.[4] The NBA firmly believes, based on a reading of the District

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[3] Consider, for instance, (a) the appellate court's assertion that the District Court was "intent on granting [plaintiff's] counsel the relief they sought" despite a putatively clear procedural bar, *Reynolds*, 207 F.3d at 1292 (where in fact, as shown in the Petition, the District Court's actions were well supported by authority and the District Court had no intent other than to do what it believed correct under the law and the facts); (b) the appellate court's assertion that the District Court "need[ed] to be reminded" of certain putative principles of law, *id.* at 1300, when (as again shown in the Petition) it is far from clear that those putative principles announced by the Eleventh Circuit are even correct; and (c) the appellate court's suggestion that the District Court reserved the grievance procedure for Black employees alone, when (as shown above) the District Court's opinion clearly shows that it did not do that. Sarcasm, and the completely baseless innuendo that the District Court had some agenda other than to decide the case on its merits, are throughout the Eleventh Circuit's opinion. The NBA believes that judges—like all members of the public—should refrain from such unwarranted attacks on the federal judiciary.

[4] Consider, for instance, the Eleventh Circuit's assignment of the sanctions matter to a different District Judge, *id.* at 1302, its direction that future instances of discrimination by the Respondents cannot be addressed in this litigation by this District Judge, *id.* at 1301, and its purported vacatur of a wide variety of District Court orders that were not before the appellate court, *id.*

Court's published opinion, that this hostility was inappropriate. Even where a Court of Appeals feels that reversal is appropriate, there is no need for gratuitous and factually incorrect jabs at an eminent District Court judge. And, returning to the second Question Presented, this sort of intra-judiciary hostility should not spill over into the sanctioning of lawyers for winning their cases.

The chilling effect on zealous advocacy arising from the Eleventh Circuit's decision will not be limited to plaintiffs' counsel in civil rights cases. It will affect every litigator for every client in every civil matter in federal courts. And it will, thereby, interfere with the development of the law, as counsel shy away from making even *compelling* arguments which would probably carry the day at the trial level, for fear that those arguments will be called "sanctionable" in hindsight by a court of appeals with a different view of the law. This is a matter on which this Court's voice is urgently needed, to correct the Eleventh Circuit's action which has upset the delicate balance in this area of law.

The NBA recognizes the potential for an argument that this case is not currently in the optimal posture for review on the issue of sanctions, as specific sanctions have not yet been imposed. However, the NBA emphasizes that the chilling effect of the Eleventh Circuit's decision on *all* advocates is so substantial as to justify review now. There is no jurisdictional impediment to review at this point; the decision of the Court of Appeals is clearly reviewable under 28 U.S.C. § 1254(1) even before a final quantification of sanctions. And it seems highly unlikely that the Eleventh Circuit will moot the sanctions matter by ultimately imposing no sanctions, as that Court has already declared that plaintiffs' counsel "abused the judicial process," and that "the abuse was as gross as any we have encountered." *Reynolds*, 207 F.3d at 1299. Accordingly, there is no reason to defer review.

3. Questions 3 and 4 Relate to Fundamentals of Federal Jurisprudence as to Which This Court May Be Required to Reiterate Some Basic Principles.

The third and fourth questions, in the NBA's view, are of substantial importance even though the answers are clear-cut. As to Question 3, it is already settled that the Courts of Appeals must accept District Court's findings of fact unless they are clearly erroneous. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273 (1982). As to Question 4, it is already settled that the Courts of Appeals cannot indiscriminately overturn orders over which they have no jurisdiction. *See, e.g., Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995). While the reiteration of basic principles such as these is presumably not a desired portion of this Court's caseload, it may well be necessary for this Court to reiterate those principles in the course of addressing the other questions presented in this case. The Eleventh Circuit's decision in this case seems to depart from these settled principles. As to findings of fact, *compare Reynolds*, 996 F.Supp. at 1152 (District Court finds that the challenged promotions would cause injury to Black plaintiff class members by denying them the opportunity to compete fairly for positions) *with Reynolds*, 207 F.3d at 1299 (Court of Appeals finds that the challenged promotions would not injure any class member, and does not mention District Court's contrary finding). As to appellate jurisdiction, *see Reynolds*, 207 F.3d at 1302 (purporting to erase many orders entered by the District Court over a multi-year span of ongoing litigation). Even if this Court would not normally grant certiorari to address these fundamental questions, in this case the NBA submits that certiorari is warranted because the Eleventh Circuit's departure from these settled rules was part of its unwarranted hostile stance towards the District Court (which has been discussed above). This is further justification for certiorari review. *See* Supreme Court Rule 10(a) (certiorari warranted

where a Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, . . . as to call for an exercise of this Court's supervisory power").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,

Petitioners,

-and-

CECIL PARKER, *et al.*,

Petitioners,

v.

G. M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS WILLIAM ADAMS, *et al.*

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QUESTIONS PRESENTED

1. Whether there is a split in the circuits on the authority of a district court to issue an injunction upon a finding of civil contempt.

2. Whether counsel in this case was given sufficient due process to show cause why he should not be sanctioned under 28 U.S.C. § 1927 when the matter was remanded to the district court for further proceedings for that very purpose.

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STATEMENT OF THE CASE

A. Early History and Consent Decree I.

The original complaint in this lawsuit was filed on May 21, 1985 by six African-Americans. Plaintiffs alleged that the Alabama Department of Transportation ("ALDOT") and the State Personnel Department ("SPD") had discriminated against them in their employment because of their race. R1-1. The district court later certified three separate plaintiff classes of African-Americans. Pet. App. 4a; R1-82. On November 18, 1993, after a partial trial that lasted for several months, the plaintiffs and defendants tendered a partial settlement to the district court. R4-493. The settlement was embodied in a proposed consent decree that provided for systemic class relief and left the monetary and non-monetary claims of individual class members for subsequent trial. *Id.* At the time that the proposed consent decree was submitted to the district court, the plaintiffs had not yet finished presenting their evidence at trial. Pet. App. 5a. Hence, despite the lengthy trial record developed by plaintiffs, there is no finding of liability for racial discrimination in this case.[1]

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1. Petitioners' representation of district court findings of discriminatory practices is misleading. Petition at 3. The trial record on classwide liability in this case consists of an uncompleted presentation of their case by plaintiffs. Pet. App. 5a. In later proceedings, the district court found that the entry of Consent Decree I constituted a finding of classwide liability. That order was in effect at the time the district court entered the two orders appealed from in this case. In a separate appeal, which is law of the case, the Eleventh Circuit vacated the district court's finding of classwide liability. *Reynolds v. Roberts*, 202 F.3d 1303 (11th Cir. 2000).

Following public notice of the proposed consent decree, a group of non-black ALDOT employees ("the Adams intervenors") filed objections to certain provisions of the proposed consent decree and were granted intervention. *See Reynolds v. Roberts*, 846 F. Supp. 948, 954 (M.D. Ala. 1994); R4-506, R4-520; Pet. App. 6a. The Adams intervenors objected to race-conscious long-term and annual goal provisions requiring 33.3% black representation in all job classifications, "enhanced goal" provisions that carried forward unmet annual goal obligations indefinitely, specific set-asides of engineering positions for competition among black employees only and other race-conscious provisions of the proposed decree. *See* R4-506.

The district court permitted the Adams intervenors to challenge the race-conscious provisions of the proposed decree as intervenors, 846 F. Supp. at 954, and subsequently certified a class of non-black employees to be represented by the named intervenors. *See* R21-2612. The district court also permitted the Adams intervenors to file objections to the race-neutral provisions of the proposed decree, explaining that "the non-class member employees may only challenge the race-conscious provisions of the proposed decree as intervenors, but they may challenge the race-neutral provisions in their capacity as 'objectors' within the meaning of Section 108 of the Civil Rights Act of 1991." 846 F. Supp. at 954 n.8. Because the interrupted trial in the case had included a "vast amount of evidence of the Transportation Department's past employment practices," the district court did not permit the Adams intervenors to present additional factual evidence, but permitted the Adams intervenors to argue based only on evidence already received "that the factual predicate is not sufficient as a matter of law to warrant the type or extent of race-conscious relief contained in the proposed decree." *Id.*

The plaintiffs, defendants, and Adams intervenors subsequently engaged in discovery and negotiated revisions to both race-conscious and race-neutral provisions of the proposed consent decree. With the negotiated revisions, the proposed consent decree was severed into proposed Consent Decrees I, II, and III. Consent Decree I contains classwide remedial provisions that all parties agreed were race-neutral and was entered on March 16, 1994. R6-553. Consent Decrees II and III contain race-conscious provisions and have not been approved or entered by the district court.[2] The renegotiated Consent Decree I was entered on motion of the plaintiffs with the consent of the defendants and Adams Intervenors. Pet. App. 6a, 7a.

Since entry of Consent Decree I, the Adams intervenors have actively participated in the ongoing proceedings in the district court. This litigation over the past seven years has been extensive, including proceedings before the District Judge and all four Magistrate Judges of the Middle District of Alabama. The Adams intervenors have been involved in these proceedings in the district court to the extent that their employment interests are implicated and affected by the race-conscious relief consistently and constantly requested by the plaintiffs. In addition, the intervenors have actively sought to enforce and protect the race-neutral provisions of Consent Decree I to ensure that these remedies work

2. Consent Decrees II and III can be found in the record at R5-533 and R17-1622. The district court entered one paragraph of Consent Decree II on January 23, 1998. R20-2413. The Adams intervenors and the defendants appealed that order and injunction. On May 23, 2001, the Eleventh Circuit reversed. *See Reynolds v. Butts*, no 98-6102, __ F.3d __ (11th Cir. 2001) ("*Reynolds III*). The decision in *Reynolds III* makes clear that, at this time, Consent Decrees II and III are nothing more than plaintiffs' proposals.

effectively and thereby eliminate any need for race-conscious remedies. The district court has effectively taken plenary jurisdiction over all aspects of ALDOT's employment practices, thereby superseding the State merit system operated by SPD.

B. The Grievance-Injunction Proceedings.

Consent Decree I included a provision for the creation of an employee complaint procedure. Pet. App. 8a; R6-553. Shortly after the first grievance procedure was in place,[3] African-American employees of ALDOT began filing grievances alleging violations of Consent Decree I, including claims that they had been assigned duties outside their SPD classifications. The district court processed these grievances through the grievance process and issued injunctive orders requiring ALDOT to provisionally appoint and pay backpay to several black grievants. Pet. App. 11a, 12a; *see also* R16-1512.

On December 12, 1996, Michael Grant, John D'Arville and Andrew McCullough, non-black ALDOT employees, filed grievances under the Revised Grievance Procedure (the "Grant grievances") claiming they had been assigned duties outside their SPD classifications and seeking provisional appointments and backpay — relief similar to that which had been previously awarded to black employees by the district court. Pet. App. 12a, 13a. The district court enjoined these non-black grievances and prohibited ALDOT from

3. The original procedure provided for hearings held by a court-appointed special master followed by review by the district court. Pet. App. 254a. A revised grievance procedure, not involving the court, was approved by the district court on August 9, 1995. Pet. App. 242a, 263a.

granting Grant, D'Arville and McCullough either provisional appointments or backpay pursuant to their grievances in a preliminary injunction order dated April 9, 1997, Pet. App. 14a, 15a; R18-1760. Appeal no. 97-6347 sought review of the preliminary injunction order.

On March 3, 1998, almost one year later, the district court entered an order granting plaintiffs' request for a permanent injunction, to the extent of declaring "that processing the Grant grievances would violate Consent Decree I." This March 3, 1998 order, although framed as declaratory rather than injunctive relief by the district court, effectively prohibited and enjoined ALDOT from processing the Grant grievances. The Adams/Grant intervenors appealed the March 3, 1998 Order and the Supplemental Order dated March 5, 1998, which added language to the March 3, 1998 Order but did not alter the relief granted.

C. The Revised Grievance Procedure Adopted by the Court.

Grant, D'Arville and McCullough filed employee grievances with ALDOT under the Revised Grievance Procedure established pursuant to Article XIX of Consent Decree I and ordered by the district court in its Order and Injunction dated August 9, 1995. Pet. App. 159a, 242a, 263a. The grievance procedure ordered by the court is race-neutral on its face, Pet. App. 9a, and purports to be available to any employee of ALDOT to address claims of racial discrimination and violations of Consent Decree I. Pet. App. 242a-244a.

The grievance procedure is a four-step process. Pet. App. 10a. At Step I the grievance is submitted either to the

employee's immediate supervisor, the Division EEO representative, or if the immediate supervisor is the subject of the grievance, the head of the Division, Bureau or Section. The ALDOT management representative who reviews the grievance at Step I is required to respond to the employee in writing and may offer the employee a proposed resolution of the grievance. Pet. App. 10a, 244a-246a. If the grievance is not resolved at Step I, the process moves to Step II at which time the grievance is submitted to the EEO monitor or his representative for a formal investigation. Pet. App. 247a. At Step II, a meeting must be held between the EEO Monitor or his designee and the grievant, during which a written answer or proposed resolution is given to the grievant. *Id.* The grievance process moves to Step III only "if the grievant has not signed a written acceptance of the proposed resolution . . ." Pet. App. 248a. The Grant grievances were resolved at Step II of the process and therefore did not move to Step III (formal hearing) or Step IV (external arbitration). Pet. App. 248a-250a.

D. The Factual Basis for the Grant Grievances.

The Grant grievants alleged that ALDOT assigned duties to them which are beyond the duties of their State Personnel Department classifications in violation of Consent Decree I and they should therefore receive compensation for those services. Black employees had previously filed similar grievances alleging that they had been required to perform the duties of a higher classification. *See* R16-1512. Finding a violation of Article Fifteen, ¶4 of Consent Decree I, the district court awarded backpay and provisional appointments to the black grievants. *See id.* The Grant grievants alleged that they should not be treated differently than the black employees who had been assigned such out-of-classification

duties and received provisional appointments through the grievance process. Just as black grievants Hudson Hinton and David Lee Sims alleged before them, the Grant grievants asserted that ALDOT's assignment of out-of-classification duties to them without compensation was a violation of Article Fifteen, ¶4 of Consent Decree I. That portion of the decree provides:

> *Duties within the job description*: The Highway Department will monitor the duties and responsibilities performed by employees with the goal of assuring to the extent practicable that at least 90% of the duties and responsibilities performed by employees on a regular or non-emergency basis are within the job description for the job they are holding.

Pet. App. 152a. The evidence presented at the preliminary injunction hearing on March 22, 23, 24 and 25, 1997, established without substantial dispute that Grant, D'Arville and McCullough had been assigned out-of-classification duties without additional compensation.

E. ALDOT'S Resolution of the Grant, D'Arville and McCullough Grievances.

The Grant grievances were filed on December 12, 1996, and submitted to their supervisor. He did not offer the grievants a resolution and the grievances proceeded to Step II. A Step II hearing of the grievances was held on January 15, 1997 by EEO Monitor representative Doug Furlow. Furlow provided each of the grievants with written proposed resolutions of their grievances under Step II of the grievance procedure. Intervenors' Exh. 4 to

March 1997 Injunction Hearing. Furlow's recommendation states that, "It is recommended that Mr. McCullough be offered a provisional appointment to Civil Engineer III with backpay and other benefits including credit for the time-in-grade from April 1994. It is further recommended that Mr. McCullough suffer no retaliation for bringing forth his complaint." Intervenors' Exh. 4 to March 1997 Injunction Hearing. Recommendations for Grant and D'Arville also provided that they be provisionally appointed retroactively to the classifications which their immediate supervisor had recommended for them in April 1994, with backpay from that date. R137-759.

At the conclusion of the announcement of Furlow's recommendations, Ms. Williams, the attorney for the plaintiffs, stated that the plaintiffs had no objection to the recommendation that all three grievants receive provisional appointments. R137-759. Ms. Williams stated that the plaintiffs only objected to the award of backpay if plaintiff class members were not treated similarly in their grievances. Ms. Williams also did not object to Mr. Furlow's authority to offer such recommended resolutions. R137-759.

At the conclusion of the hearing, all grievants signed the resolutions indicating their acceptance. March 1997 Injunction Hearing, Intervenors' Exh. 4. Under the Revised Complaint Procedure, if a grievant accepts the proposed written resolution offered to him at Step II, the grievance process is concluded. Pet. App. 248a.

F. The District Court Orders Enjoining Implementation of the Grievances of Non-Black Employees.

On February 26, 1997, as ALDOT was prepared to implement the Grant, D'Arville and McCullough grievance resolutions awarding backpay and provisional appointments, plaintiffs filed a motion for a temporary restraining order alleging that such action would violate Consent Decree I and related court orders. R17-1585. The district court granted plaintiffs' motion in orders dated February 27 and March 11, 1997, R17-1587 and R17-1644, and conducted evidentiary hearings on March 22-25, 1997. On April 9, 1997, the district court issued a preliminary injunction preventing ALDOT from implementing the Grant grievance resolutions. Pet. App. 205a.

On March 10 and 28, 1997, plaintiffs filed additional motions for temporary restraining orders and preliminary injunction which sought to block the processing of a number of other grievances filed by non-black employees. R17-1635 and Pet. App. 216a. The court treated these as motions for permanent injunctions and set them for final hearing on April 23, 1997. R17-1643 and R18-1726. The district court did not rule on plaintiffs' motion for permanent injunctive relief until March 3, 1998 — almost one year later. R20-2475. Citing anecdotal evidence tendered by plaintiffs in the aborted 1992 trial, Pet. App. 37a-44a, the district court claimed that the Grant grievances "would violate, in ways almost too numerous to list, both Consent Decree I and earlier injunctions in [*United States v.*] *Frazer*." Pet. App. 85a. The district court, in extended discussion, rejected the intervenors' claims that the Grant grievances were brought alleging the very same bases for relief used by the district court in ordering relief on grievances filed by black ALDOT

employees. Pet. App. 67a-85a. The district court conceded that part of its earlier analysis in its orders resolving grievances brought by black employees had been "incorrect and improvidently stated." Pet. App. 85. The court withdrew the "syllogism" upon which it had based relief for black employees, but allowed the relief for the black grievants to stand.

The district court granted plaintiffs' motions for permanent injunctive relief by declaring as follows:

> Provisionally appointing, promoting, or paying backpay to employees Andrew McCullough, Michael Grant, and John D'Arville [the non-black grievants] pursuant to the grievances they filed would violate the consent decree entered on March 16, 1994 (Doc. no. 553) and the orders entered in *United States v. Frazer*, civil action no. 2709-N (M.D. Ala.).

Pet. App. 98a. The district court's 1998 order granted plaintiffs' motions for injunctive relief, prohibiting grievances filed by non-black employees, while allowing nearly identical grievances filed by black employees to proceed to resolution.

G. The Eleventh Circuit's Decision.

The U.S. Court of Appeals for the Eleventh Circuit (Tjoflat and Dubina, C.JJ. and Story, D.J.) vacated both the 1997 preliminary injunction and the 1998 declaratory judgment and directed the district court to restore the *status quo ante*. Pet. App. 3a.

The appeals court vacated the preliminary injunction finding that the Grant grievance "resolutions injured no member of a plaintiff class on account of race or in any other way." Pet. App. 20a. Hence, the plaintiffs lacked standing to seek injunctive relief and "plaintiffs' counsel were proceeding strictly on their own . . . bent on preventing the three white grievants from obtaining provisional appointments and backpay." Pet. App. 21a. The appeals court further observed that plaintiffs' counsel's actions seeking an injunction against matters which caused their clients no harm was an "abuse [of the judicial process] as gross as any we have encountered." Pet. App. 21a.

In vacating the declaratory judgment, the Eleventh Circuit observed that it is without dispute that Consent Decree I only provided "race-neutral prospective relief," and that Article 19 plainly required ALDOT to adopt a grievance procedure that ". . . would be made available to everyone, including a non-black." Pet. App. 22a-23a. The race-neutral grievance procedure was approved by the plaintiffs' counsel as well as the district court, "and thus made it an amendment to Consent Decree I." Pet. App. 23a. The appeals court found that plaintiffs' counsel's claim that the non-blacks' invocation of the grievance procedure violated Consent Decree I "is more than sophistic; it is preposterous." *Id.* The court found that counsel's efforts were designed to modify the grievance procedure as grafted into Consent Decree I without seeking relief on a "legally-recognized ground for vitiating contracts." *Id.* The appeals court found it necessary to instruct counsel and the district judge that consent decrees are contracts and the district court must uphold an unambiguous decree as written. Pet. App. 24a. Here, the appeals court found that the district judge's decision to enter a declaratory judgment

was, in effect, an impermissible modification of an unambiguous contract requiring race-neutral application of the grievance procedure. Pet. App. 24a, 25a.

Finally, consistent with its findings that the efforts of plaintiffs' counsel to obtain an injunction were an abuse of process, Pet. App. 21a, and counsel's arguments that the grievants use of the grievance procedure violated Consent Decree I were "sophistic" and "preposterous", Pet. App. 23a, the Eleventh Circuit further found that counsel invited the district court's error in its entry of the preliminary injunction and then attempted to defend the district court's ruling on appeal with baseless arguments. Pet. App. 26a. The appeals court found that it had authority to award sanctions under 28 U.S.C. § 1927 and directed the district court, on remand, to "enabl[e] plaintiffs' counsel to show cause why section 1927 sanctions should not be awarded to the Adams Intervenors." Pet. App. 27a.

REASONS FOR DENYING THE WRIT

Petitioners claim that review should be granted to address: (1) an alleged circuit conflict on the means available to a district court to enforce a consent decree; (2) whether petitioners' counsel was denied due process when the appeals court directed that counsel show cause why sanctions should not be imposed; (3) whether the appeals court's rejection of the district court's findings of fact was beyond its authority; and (4) whether the appellate court exceeded its authority in directing the district court to restore the *status quo ante*.

Petitioners have not demonstrated any error by the Court of Appeals that warrants review by this Court. First, there is no circuit split on the means by which a district court may

enforce an injunctive consent decree. The Eleventh Circuit recognized that the proper way to enforce an injunction is through the contempt power of the district court. Pet. App. 18a, 19a. The court never said that any other relief is forbidden. Rather, the court said that the entry of injunctive relief here was inappropriate when plaintiffs had not sought contempt enforcement, plaintiffs had no standing to seek an injunction, and plaintiffs' argument that the Grant grievances violated Consent Decree I was "preposterous" given the plain language of the earlier orders.

Second, the issue of sanctions is not ripe for this Court's review as further proceedings directed to this issue are ongoing in the lower courts. Third, petitioners have made no demonstration that the appeals court's rejection of district court findings that have no basis in the record warrants review by this Court. Finally, the suggestion that this Court must act to avoid the "vacating of scores of district court orders," is a blatant and intentional misinterpretation of the Eleventh Circuit's decision that nobody has seriously suggested in the ongoing proceedings in the district court.

I. The Court of Appeals Correctly Recognized The General Rule That Injunctions Are Enforced Through The Court's Contempt Powers.

In its decision vacating the injunctive and declaratory relief ordered by the district court, the Court of Appeals stated that "injunctions, including consent decrees, are to be enforced . . . through the trial court's civil contempt power." Pet. App. 18a. The district court's decision also acknowledges this rule. Pet. App. 92a, 93a. Petitioners allege that the Court of Appeals held that "the District Court below did not have the power to enter its preliminary injunction and declaratory

judgment." Petition at 12. The appellate court made no such finding. Rather, it found that the plaintiffs failed to seek contempt relief and instead sought and received injunctive relief when they were not entitled to any such relief *on the merits*. Petitioners' effort to cobble together an issue worthy of certiorari review is disingenuous.

The Eleventh Circuit vacated the preliminary injunction finding that plaintiffs lacked standing to seek such relief. The grievance "resolutions injured no member of a plaintiff class on account of race or in any other way." Pet. App. 20a. Rather, the court found that plaintiffs' counsel was "bent on preventing the three white grievants from obtaining provisional appointments and back pay." *Id.* 21a. "Because [plaintiffs] suffered no injury that would warrant relief . . . plaintiffs' counsel lacked standing to prosecute their application for a preliminary injunction." *Id.*

Similarly, the Eleventh Circuit vacated the "declaratory judgment" finding that it was effectively a modification of a permanent injunction[4] transforming the race-neutral grievance procedure into a procedure that was only available for black employees. Pet. App. 23a, 24a. On that basis, the appeals court instructed that a district court is obligated to uphold the unambiguous language of a consent decree. *Id.* 24a.

While the Eleventh Circuit did say that "an application for injunctive relief is an inappropriate device for enforcing a consent decree," *id.*, it did not hold that the district court lacked jurisdiction to ever enter an injunction under appropriate circumstances. Given its disposition of the case

---

4. *See* Pet. App. 16a, n.17.

on the basis of standing as well as the merits of the injunction, the Court of Appeals had no reason to address whether an injunction could ever issue in the course of contempt proceedings. But, an injunction is not an alternative procedure to invocation of the court's contempt power.

Nor have the petitioners demonstrated a conflict in the decisions of other circuits. *Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985) is a case that addresses a district court's authority in civil contempt proceedings. In *Berger*, the plaintiff filed a motion for contempt and demonstrated that the Secretary of HHS refused to comply with a prior consent decree governing eligibility for federal Supplemental Security Income ("SSI") benefits. 771 F.2d at 1562. Because the original decree was entered in a case without a certified class, the Secretary argued that similarly situated persons could not enforce the decree. Finding that the Secretary had refused to obey the decree, and further finding that the Secretary intended to limit the decree's benefits only to persons in the Eastern District of New York, the district court determined that further injunctive relief was necessary to ensure that the decree protected the interests of all similarly situated persons entitled to SSI benefits. Under such circumstances, the district court's injunction was justified in fashioning "full remedial relief" for the Secretary's contempt. 771 F.2d at 1568-69.

In *Gates v. Collier*, 616 F.2d 1268, 1271 (5th Cir. 1980), the Fifth Circuit first found noncompliance with a prior order and noted that "the court may use any of the weapons generally at its disposal to ensure compliance." *Brewster v. Dukakis*, 675 F.2d 1 (1st Cir. 1982) was not a case involving issues of compliance by a defendant. Rather, it involved an effort to seek clarification of the decree "under the court's

power to interpret the decree . . ." The First Circuit stated that "on the periphery of the court's power to interpret is also a limited power to issue injunctive relief which may be used to protect rights and enforce duties once they have been clarified." *Id.* at 3. The Eleventh Circuit said nothing that conflicts with that ruling.

None of the other cases cited by petitioners demonstrate a split between the circuits. Rather, the courts acknowledge the proposition that the party seeking to enforce a consent decree should demonstrate a violation of the decree through the court's contempt power. Upon a demonstration of noncompliance, or in other words, civil contempt, the district court is required to fashion appropriate limited relief to ensure that the respondent promptly comes into compliance. Such a rule has been recognized for over 180 years. *See Spallone v. United States*, 493 U.S. 265, 276 (1990) ("'least possible power adequate to the end proposed,'" quoting *Anderson v. Dunn*, 6 Wheat 204, 5 L. Ed. 242 (1821)).

The Eleventh Circuit has not departed from the well recognized principle that a district court must fashion appropriate relief to redress violations of an unambiguous order. For that reason, it has reconfirmed that the appropriate and accepted procedure for raising instances of noncompliance is through invocation of the court's contempt powers. In this case, however, the petitioners followed a different course. Rather than prove noncompliance — which they could not do given the unambiguous provisions of the prior orders — they sought an injunction. In reality, as the Eleventh Circuit observed, the injunction sought was a modification or reformation of the earlier orders establishing race-neutral procedures. The Eleventh Circuit recognized that the district court retained the power to modify the injunctive

orders as necessary under the law governing interpretation or reformation of contracts and injunctions. Pet. App. 23a-25a. Nothing in the Eleventh Circuit's decision restricts the right of a district court to clarify or modify a consent decree. *See Rufo v. Inmates of Suffolk Court Jail*, 502 U.S. 367 (1992). But, a district court cannot unilaterally modify a decree in the context of an application for declaratory or injunctive relief.

Petitioners have failed to demonstrate how the Eleventh Circuit's decision varies from settled law of the other circuits or this Court to warrant review.

II. Counsel Has Not Been Denied Due Process.

Petitioners' counsel alleges he was denied due process when the Eleventh Circuit found that his actions in the district court and on appeal were an abuse of the judicial process and sanctionable under 28 U.S.C. § 1927. Again, counsel has made no demonstration that the Eleventh Circuit's decision warrants review by this Court.

As the Eleventh Circuit made clear, "counsel subject to section 1927 sanctions are entitled to be heard regarding the matter . . ." Pet. App. 27a. The appeals court directed the district court to give counsel such an opportunity to "show cause why section 1927 sanctions should not be awarded to the Adams Intervenors." *Id.*

On remand, counsel assembled a task force of lawyers to ensure that due process was obtained. Following discovery, counsel filed a voluminous submission together with several briefs. U.S. District Judge Ira DeMent entered an order providing, in relevant part:

> Having been assigned to the undersigned (Doc. No. 4438), the court, as instructed by the Eleventh Circuit, has given Plaintiffs' counsel an opportunity to be heard on the issue of whether or not § 1927 sanctions should be assessed against them and awarded to the Adams intervenors. Plaintiffs' counsel filed briefs and a smorgasbord of evidentiary materials, including affidavits, depositions and a 19.5 pound box of exhibits. The court has reviewed the voluminous pleadings, exhibits, motions and orders filed on the sanctions issue. The court concludes that neither further briefing, oral argument nor an evidentiary hearing are necessary.
>
> In accordance with the opinion of the Eleventh Circuit, the court hereby ORDERS the Clerk of the Court to certify the following pleadings and all exhibits attached thereto to the Eleventh Circuit . . .

Order, March 28, 2001 (doc. no. 4889). Counsel then filed a notice of appeal, thereby returning the sanctions issue to the Eleventh Circuit where it now resides and awaits further proceedings. Respondents believe this Court should not address the issue of sanctions, especially in the context of due process, until the matter is finally concluded in the lower courts.

III. The Eleventh Circuit Was Well Within Its Authority In Rejecting The District Court's Findings.

Petitioners claim the Court of Appeals acted outside its authority in rejecting the district court's findings. Again, petitioners offer nothing to warrant review by this Court.

The Eleventh Circuit's decision turned on several important yet limited findings that were well within its authority:

- Plaintiffs lacked standing to seek a preliminary injunction because nothing in the grievance resolutions injured any member of the plaintiff class. Pet. App. 17a, n.18 and 20a. Rather, such resolutions constituted make-whole relief for violations of Consent Decree I.

- The plain language of Consent Decree I and the Revised Grievance Procedure are race-neutral and both black and non-black employees are entitled to the benefits and protections of those orders. *Id.* 22a-24a.

- Because the orders were unambiguous, the trial court's consideration of extrinsic evidence was erroneous. *Id.* 24a, 25a, n.23. Hence, the "findings" based on that evidence were inappropriate.

None of the foregoing matters are purely factual findings subject to the clearly erroneous standard of Fed. R. Civ. P. 52(a). There is certainly nothing in the appellate court's evaluation of the record worthy of certiorari review.

IV. Nothing In The Eleventh Circuit's Decision Overturns Orders Not On Appeal.

Petitioners frivolously assert that chaos has ensued from the appellate court's direction to "restore the *status quo ante*." Petitioners are "crying wolf." After the issuance of the mandate, the district court properly complied by vacating

the orders on appeal and restoring the *status quo* with respect to the matters at issue in this appeal. But, to suggest that any party or the district court construed the appellate court's direction to require the vacation of four years of proceedings involving numerous other issues not before the Court of Appeals — thousands of documents — is absolutely false. Nothing of the sort has occurred. Moreover, nothing on this point is worthy of certiorari review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,

Petitioners,

v.

G.M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

DEFENDANT-RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. Proceedings in the District Court

The following summary of the factual and procedural history of this case is, in part, paraphrased from the opinion of the Eleventh Circuit Court of Appeals. Pet. App. 1a.

1. Proceedings Leading to Consent Decree I. The named plaintiffs brought this suit against the Defendant-Respondents Alabama Department of Transportation, State Personnel Department, and various state officials (collectively "the Department") in May 1985, alleging that the Department had discriminated against them in their employment because of their race. In October 1986, the district court certified three plaintiff classes. Pet. App. 4a.

In June 1992, the case proceeded to trial before the district court. After several months of trial, but before plaintiffs rested, the court granted the parties' request for an indefinite recess for the purpose of settlement negotiations. In November 1993, the parties reached a partial settlement and presented a proposed consent decree to the court. Pet. App. 5a.

The proposed decree provided for prospective injunctive relief, but left the monetary and non-monetary claims of individual class members for subsequent trial. Among other relief, the decree set hiring and promotion quotas for blacks. To ensure an adequate pool for this set-aside program, the decree directed the Department to mount an aggressive recruiting campaign at historically black colleges and universities. Finally, the decree

required the Department to establish a grievance procedure for its employees. Pet. App. 5a.

The district court scheduled a hearing for January 19, 1994, to entertain any objections to the terms of the proposed decree. On January 13, a group of white Department employees (the "Adams Intervenors") sought leave to intervene on behalf of the Department's non-black employees in order to challenge the race-conscious provisions of the proposed decree – specifically, the quota requirement for all job classifications in the Department. The court granted the motion. Pet. App. 6a.[1]

More than 200 people attended the January 19 hearing, including many non-black employees of the Department. The objections to the race-conscious aspects of the proposed consent decree were such that the parties withdrew it and, with leave of court, went back to the drawing board. By late February 1994, the plaintiffs and the Department decided to divide the previously proposed decree into three parts, called Consent Decrees I, II, and III. Consent Decree I contained the provisions – some of which were modified as a result of negotiations with the Adams Intervenors – which all sides agreed provided only race-neutral prospective relief. Consent Decrees II and III contained provisions that were acceptable to the plaintiffs and were then acceptable to the Department, but were opposed as race-conscious by the Adams Intervenors. Pet. App. 6a.

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[1] The district court later certified an additional class, consisting of the Department's non-black employees.

The parties submitted Consent Decree I to the district court for approval, and, on March 7, the court held a hearing on the fairness of the proposal. No one other than the parties' attorneys appeared at the hearing, and no one objected to the entry of the decree. The court approved the decree and, by order entered March 16, 1994, adopted it in full. Pet. App. 7a.

2. *District Court's "Findings."* The Petition makes the extraordinary statement that "the District Court ultimately found[ ] that ALDOT had manipulated and circumvented employment procedures so as to avoid hiring or promoting black employees." Pet. 3. As previously noted, Consent Decree I was entered before the close of plaintiffs' case. Pet. App. 5a. The Department had no opportunity to rebut the plaintiffs' evidence or to offer evidence of its own. Based on this partial trial, the district court was never in a position to make any "findings." In May 1996, during a hearing to establish a back pay formula, the district court announced from the bench that Consent Decree I had established "class-wide liability." *Reynolds v. Roberts*, 202 F.3d 1303, 1310 (11th Cir. 2000) (*"Reynolds I"*). This decision was challenged in a previous appeal, however, and was reversed. *Reynolds I*, 202 F. 3d at 1319. Accordingly, the Department respectfully submits that plaintiffs' erroneous statements as to the district court's "findings" should be disregarded.

3. *Consent Decree I.* Consent Decree I is composed of a series of "Articles" which revamped the process by which the Department hires, promotes, classifies, and pays its employees. None of the Articles of Consent Decree I provide special benefits or procedures for black employees of the Department. Pet. App. 7a.

The only Articles relevant to this appeal are Article 15 and one provision of Article 19. Article 15 required the Department to conduct a study of all its employees (regardless of race) to determine if any employees were being assigned duties associated with a higher job classification than the one they then held, without receiving the higher pay and benefits associated with that position. If the study uncovered an employee "spending a majority of [his or her] working time in the performance of the duties and responsibilities of a higher job classification," the Department was required to reclassify the employee at the higher level (and therefore increase that employee's salary). Article 15 also required the Department "to monitor the duties and responsibilities performed by employees with the goal of assuring to the extent practicable that at least 90% of the duties and responsibilities performed by employees on a regular or non-emergency basis are within the job description for [the] job they are holding." Pet. App. 7a-8a.

4. *The Grievance Procedure.* Article 19 mandated the creation of a grievance procedure that individual employees could use:

> Within 180 days of the effective date of this Decree, the Highway Department will develop and implement an enhanced complaint procedure which assures that all discrimination complaints are processed without fear and reprisal within established time limits and that appropriate action is taken following [the resolution of a complaint]. Such procedure will be submitted to plaintiffs' counsel for review and

> comment at least 30 days prior to its implementation.

Pet. App. 8a.

The Department complied with this mandate and submitted a proposed complaint procedure, designated the "Revised Complaint Procedure," to plaintiffs' counsel for review. Plaintiffs' counsel approved the procedure. Although Article 19 did not require it to do so, the Department submitted the procedure to the district court. On August 9, 1995, the court incorporated the procedure in an "Order and Injunction." Pet. App. 8a-9a.

The grievance procedure is race-neutral. It opens by stating that "[t]he Consent Decree and Departmental policy mandate that all employees enjoy a work-place free from discrimination." The procedure allows a grievance to be filed for any "alleged wrong based upon the employee's race, color, creed, sex, national origin, age, or handicap." Moreover, it allows grievances for "a violation of the Consent Decree, or arising from matters that are the subject of the Consent Decree." The procedure is available to the Department's employees without regard to race. Pet. App. 9a.

The grievance procedure consists of four steps. In step one, a grievance is submitted to an employee's immediate supervisor. The supervisor responds in writing with a proposed resolution, which may or may not be accepted by the grievant. If the grievance cannot be resolved, it is submitted in step two to the Department's appointed Equal Employment Opportunity ("EEO") Monitor, who also proposes a solution. If the grievant finds the solution unacceptable, the process moves to step

three. Step three is a formal hearing within the Department, conducted by the Department's "Hearing Officer." If the matter is still not resolved, then, at step four, either party may seek arbitration before "an external arbitrator . . . selected from a panel of Seven (7) arbitrators, with Three (3) of such panel members to be designated by class counsel, Three (3) to be designated by the Department, and One (1) to be designated by agreement among the other Six." An employee with a grievance is not required to invoke the Revised Complaint Procedure; as the procedure states, an employee may file an "administrative charge or separate legal action" instead. Pet. App. 10a.

5. *The Grievances.* As noted, Consent Decree I approved in 1994 requires the Department, "to the extent practicable," to assure that employees are performing the duties within their job classification and are not being assigned extra duties without compensation. By 1996, a number of black employees of the Department had filed grievances alleging that the Department had assigned them out-of-classification duties. They sought back pay and/or a "provisional appointment" to the position whose duties they were actually performing. At least two of these grievances eventually made their way to the district court for a ruling, and, in both, the court ordered back pay and issued an injunction mandating a provisional appointment for the employee. In neither of these grievances did the district court make a finding that the grievant had been the victim of discrimination – the court found only that they had been performing duties outside their job classification, in violation of Article 15. Pet. App. 12a.

In late 1996, three white employees of the Department ("the white grievants") filed grievances alleging that they too had been assigned duties outside their job classification in violation of Article 15. They sought back pay and provisional appointments. The employees' supervisor (all three apparently had the same supervisor) did not provide a satisfactory resolution, and a single hearing for all three grievants was held before the Department's EEO Monitor. The EEO Monitor recommended back pay and provisional appointments for all three, a resolution which was accepted by the white grievants. Pet. App. 12a-13a.

6. *District Court Orders.* On February 26, 1997, counsel for the three plaintiff classes ("plaintiffs' counsel") moved the district court for a temporary restraining order ("TRO") to prevent the Department from implementing the resolutions in favor of the white grievants. They alleged that the Department's implementation of the resolution of the grievances would violate Consent Decree I. The next day, the court conferred with plaintiffs' counsel and the Department's attorneys by telephone; later that day, it issued a TRO which enjoined the Department from implementing the three grievance resolutions. On March 10, plaintiffs' counsel applied for a preliminary injunction and asked the court to extend the TRO until their application could be heard. After another telephone conference with the attorneys, the court extended the TRO and scheduled a hearing for March 24 on the application for a preliminary injunction. Pet. App. 13a-14a.

The hearing was held as scheduled. On April 9, 1997, the court "preliminarily ENJOINED and RESTRAINED" the Department and its agents "from provisionally

appointing, promoting or paying backpay to [the three white grievants]." The Adams Intervenors timely appealed from this preliminary injunction. Pet. App. 14a-15a.

On March 28, before the court had ruled on the application for a preliminary injunction, plaintiffs' counsel applied for a second preliminary injunction; this time, they asked the court to prevent the Department from processing any grievances by non-black employees. Counsel alleged that allowing any non-blacks to utilize the grievance procedure would violate Consent Decree I. The court treated counsel's application as one for a permanent injunction and held hearings in late April 1997. Eleven months later, on March 3, 1998, while the Adams Intervenors' appeal of the April 9 preliminary injunction was pending in the Eleventh Circuit, the district court, in a memorandum order, ruled on counsel's application. See *Reynolds*, 996 F. Supp. 1130. Pet. App. 15a.

In its March 3, 1998, order, the court did not grant plaintiffs' counsel a permanent injunction; instead, acting *sua sponte*, it gave them declaratory relief. It stated that allowing non-black employees to file grievances would be "a tool to allow supervisors again to engage in the secretive and non-competitive selection and promotion of employees." *Id.* at 1132. The court expressed concern that an employee and supervisor would collude to circumvent the competitive system for employment contemplated by the consent decree: the employee, under the direction of his supervisor, would file a fake "grievance," which would result in the supervisor awarding a provisional appointment and back pay. *Id.* at 1139. Despite this concern, the court concluded that issuing an order enjoining

the Department from hearing grievances of non-blacks would be inappropriate under the Eleventh Circuit's decision in *Newman v. Alabama*, 683 F.2d 1312, 1318 (11th Cir. 1982), holding that consent decrees, like all injunctions, are to be enforced through the district court's civil contempt power. Instead of entering a permanent injunction against the Department, the district court entered a declaratory judgment, stating that "the plaintiffs' motions for permanent injunctions . . . are granted to the extent that it is declared as follows: Provisionally appointing, promoting, or paying backpay to [the three white grievants] pursuant to the grievances they filed would violate the consent decree." *Reynolds*, 996 F. Supp. at 1156. Pet. App. 15a-17a.

The Adams Intervenors appealed this declaratory judgment. The Eleventh Circuit consolidated the appeal with their appeal of the preliminary injunction. Pet. App. 18a.

B. Proceedings in the Court of Appeals

The Eleventh Circuit vacated both the preliminary injunction and the declaratory judgment. Pet. App. 18a. It noted that consent decrees, like other injunctions, are to be enforced through the trial court's civil contempt power, citing *Newman*, 683 F.2d at 1317-19. Pet. App. 18a. The court's rationale for vacating the preliminary injunction and declaratory judgment, however, was not based upon the unavailability of such remedies for the enforcement of consent decrees.

The court held that the district court erred in entering the preliminary injunction barring the Department

from implementing the EEO Monitor's resolutions of the white employees' grievances, finding that the Monitor's resolutions did not injure any member of a plaintiff class on account of race or in any other way. Pet. App. 20a.

The court of appeals' determination that the declaratory judgment was in error was based on the merits. The court found that the Revised Complaint Procedure was an amendment to, rather than a violation of, Consent Decree I. Pet. App. 23a. In so holding, the court noted that (a) Consent Decree I provides only race-neutral prospective relief, (b) Article 19 required the Department to draft a complaint procedure and to submit the procedure to "plaintiffs' counsel for review and comment," (c) the Department drafted the "Revised Complaint Procedure" and submitted it to plaintiffs' counsel as Article 19 required, (d) that the draft was entirely neutral with respect to "race, color, creed, sex, national origin, age, or handicap," and (e) the draft was approved by plaintiffs' counsel and by the district court. Pet. App. 22a-23a. The court concluded that the district court had improperly "rewritten" Consent Decree I to make the Revised Complaint Procedure available only to blacks. Pet. App. 17a n.18, 25a.

In addition to concluding that the district court had erred, the court of appeals was critical of plaintiffs' counsel for "inviting" the errors made by the district court. Pet. App. 26a. Because no class member had suffered injury, the court stated that "plaintiffs' counsel were proceeding strictly on their own" and "actually representing no one but themselves" in seeking a preliminary injunction. Pet. App. 21a. The court opined that plaintiffs' counsel's efforts to "prevent[ ] the three white grievants from

obtaining provisional appointments and back pay," proceeding "as if the white grievants had done something unlawful by invoking the race-neutral complaint procedure," was an abuse of judicial process that was "as gross as any we have encountered." Pet. App. 21a. The court was particularly troubled by plaintiffs' counsel's "vigorous" opposition to the white grievants' efforts to intervene for the purpose of protecting their rights to use the race-neutral grievance process. Pet. App. 21a-22a.

The court of appeals characterized the plaintiffs' argument that the Revised Complaint Procedure "violated" Consent Decree I as "preposterous," Pet. App. 23a, holding:

> Consent decrees are contracts, and we construe them using the normal tools for interpreting contracts. . . . Where they are unambiguous, the court must uphold a decree as written. In this case, the contract – the Revised Complaint Procedure – is unambiguous. Moreover, although it was drafted by the Department's attorneys, it was approved by the plaintiff classes' highly sophisticated attorneys.

Pet. App. 23a n.22. Rather than "mutual mistake of fact or some other legally-recognized ground for vitiating contracts," the court found that the plaintiffs sought relief only "[b]ecause they thought they had made a bad bargain, and they wanted to undo it." Pet. App. 23a. Finally, the court found that "[i]n addition to inviting the error, plaintiffs' counsel have attempted to defend the district court's ruling on appeal with baseless arguments." Pet. App. 26a.

The court concluded that it had the authority under 28 U.S.C. § 1927 (1994) to award "excess costs, expenses, and attorneys' fees reasonably incurred" because of counsel's conduct, but that "[c]ounsel subject to section 1927 sanctions are entitled to be heard regarding the matter. . . . " Pet. App. 26a-27a. The court directed the case to be assigned to a different district judge "for the purpose of enabling plaintiffs' counsel to show cause why section 1927 sanctions should not be awarded to the Adams Intervenors." Pet. App. 27a.

Finally, the opinion stated:

> The [district] court is instructed to restore the case to the status quo ante, which means nothing has happened in this case since August 9, 1995, when the district court entered its Order and Injunction, amending Consent Decree I to incorporate the Revised Complaint Procedure.

Pet. App. 28a. There was no indication in the opinion that this instruction to restore the case to "status quo ante" was intended to vacate any orders or other proceedings that were not before the court.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

There are no compelling reasons for granting the writ in this case. Contrary to plaintiffs' argument, there is no circuit split as to any of the issues addressed in the Petition. Plaintiffs argue that the circuits are split as to

the remedies available to the district court for enforcement and interpretation of consent decrees. This argument, however, is based on a mischaracterization of the Eleventh Circuit's decision.

The second issue, that of sanctions against plaintiffs' counsel, is premature, since no sanctions have been awarded, and proceedings are ongoing in the courts below. Neither the sanctions proceedings, nor the Eleventh Circuit's rejection of the district court's findings addressed in the third issue, presents any issue of law requiring resolution by this Court. Rather, both the second and third issues are simply fact-based arguments that the Eleventh Circuit has erred. The final issue presented by the Petition is, like the first, premised on a mischaracterization of the Eleventh Circuit's decision.

Accordingly, the Department submits that the Petition presents no issue worthy of this Court's review.

I. Because the Eleventh Circuit Has Neither Foreclosed Declaratory or Injunctive Relief To Interpret or Enforce Consent Decrees, Nor Held that Consent Decrees May Be Modified Only at the Instance of Defendants, Its Decision Does Not Conflict with Decisions of this Court or Other Circuits

Plaintiffs argue that the Eleventh Circuit's decision in this case is in direct conflict with decisions of other courts of appeals, because it "held that district courts could address problems arising in implementation of consent decrees only through contempt proceedings and, accordingly, that the District Court below did not have the power to enter its preliminary injunction and declaratory

judgment." Pet. 11. The Eleventh Circuit did not so hold. Indeed, it has expressly recognized that, in appropriate cases, declaratory or injunctive relief can be afforded to interpret or enforce a consent decree, and that a consent decree can be modified at the request of either party. Therefore, the opinion is not in conflict with the decisions of this Court or any other court of appeals.

A. Injunctions To Enforce Consent Decrees

Although the Eleventh Circuit has discouraged district courts from entering injunctions to enforce consent decrees, this practice is not prohibited, so long as the burden of proof for entry of such an injunction is met. Typically, this burden cannot be met because contempt proceedings and sanctions are regarded as "adequate remedies at law." *Newman v. Alabama*, 683 F.2d 1312, 1319 (11th Cir. 1982). Thus, the Eleventh Circuit's view is consistent with standard injunction principles applied in every circuit.

In *Newman*, a consent decree had been entered mandating reductions in overcrowding of state prisons and specifically requiring removal of state prisoners from county jails. 683 F.2d at 1315. The State failed to comply with this decree by the deadlines imposed. *Id.* The plaintiffs did not initiate contempt proceedings for this violation, however. Instead, they sought, and the district court entered, a further order directing the immediate release of 352 state prisoners from custody. *Id.* at 1315-16. The Eleventh Circuit determined that, rather than "enforcing" the consent decree, this order was a "distinct mandatory injunction in which the court framed relief that was

beyond the contemplation of the consent decree." *Id.* at 1318.

The Eleventh Circuit in *Newman* noted the variety of sanctions available for failure to comply with a consent decree, including incarceration of responsible state officials or remedial fines. Because of the availability of such sanctions, the court held that no further injunction should have been entered. It reasoned that "the plaintiffs did not carry their burden of showing the inadequacy of their legal remedy." In particular, the plaintiffs "made no showing that the State, if adjudged in contempt for violating the consent decree, would not respond to any of the traditional sanctions available to the court to coerce compliance; the court was therefore not presented with a situation in which its contempt power might be ineffectual." *Id.* at 1319-20. The court further noted, "It could be argued that a conclusion that the court's contempt power is ineffectual cannot be drawn until the court first exercises that power and sanctions fail to produce compliance with the underlying order." *Id.* 1321 n.18. Thus, rather than holding that district courts have no power to issue injunctions to "enforce" consent decrees, the Eleventh Circuit in *Newman* held that injunctive relief may be granted in the event contempt sanctions are shown to be "ineffectual."

In this case, the Eleventh Circuit based its reversal of the preliminary injunction, at least in part, on the absence of any showing that the plaintiffs would be injured by the conduct they sought to prohibit. Pet. App. 20a. Therefore, as in *Newman*, the reversal was based on the plaintiffs' failure to satisfy their burden of proof, not on any rule of law precluding such injunctions in every case.

B. Interpretation of Consent Decrees

Similarly, the Eleventh Circuit has not held that district courts lack the power, through declaratory judgment or otherwise, to interpret ambiguous consent decrees. Indeed, the court in this case expressly held that "[c]onsent decrees are contracts, and we construe them using the normal tools for interpreting contracts." Pet. App. 24a.

The Eleventh Circuit's objections to the declaratory judgment in this case were twofold. First, the court found that, because injunctive relief was inappropriate, the district court could not substitute a declaratory judgment which "it fully expected the Department to treat as an injunction." Pet. App. 16a, 24a. Second, and more importantly, the court found that Consent Decree I, as amended by the Revised Complaint Procedure, was unambiguous and that the declaratory judgment improperly "amended" or "rewrote," rather than "construed," Consent Decree I. Pet. App. 17a n.18, 25a.

In short, the Eleventh Circuit plainly has not foreclosed the use of declaratory judgments to interpret ambiguous consent decrees. Consequently, this case does not conflict with any of the decisions cited by petitioners.

C. Modification of Consent Decrees

Finally, the Eleventh Circuit did not hold, as argued in the brief of the National Bar Association, that a consent decree cannot be amended at the request of plaintiffs. The court in this case noted a "strong public policy against judicial rewriting of consent decrees" and stated that "a

district court may not impose obligations on a party that are not unambiguously mandated by the decree itself." Pet. App. 24a. It also recognized, however, that consent decrees can be modified:

> Consent decrees are construed according to accepted contract principles. *See Reynolds I*, 202 F.3d at 1312-13. We note, however, that "[f]or the purposes of modification, consent decrees are not governed by contract law, but are treated as judicial acts, akin to injunctions." *Jacksonville Branch, NAACP v. Duval County Sch. Bd.*, 978 F.2d 1574, 1578 (11th Cir. 1992).

Pet. App. 23a n.22.

In *Jacksonville Branch*, cited with approval in the above note, the request for modification was made *by the plaintiff*. The Eleventh Circuit expressly held that the district court had the "inherent power" to grant the plaintiff's request:

> The district court unquestionably had the inherent power to grant a modification in the CSA. *See United States v. Swift & Co.*, 286 U.S. 106, 114, 52 S. Ct. 460, 462, 76 L. Ed. 999 (1932); *Hodge v. Department of Housing and Urban Development*, 862 F.2d 859, 861-62 (11th Cir. 1989). Modification may be considered when (1) a significant change in facts or law warrants change and the proposed modification is suitably tailored to the change, (2) significant time has passed and the objectives of the original agreement have not been met, (3) continuance is no longer warranted, or (4) a continuation would be inequitable and each side has legitimate interests to be considered. *Rufo v. Inmates of Suffolk County Jail*,

> [502 U.S. 367], 112 S. Ct. 748, 764, 116 L. Ed. 2d 867 (1992); *Newman*, 740 F.2d at 1520.

978 F.2d at 1582. The court in *Jacksonville Branch* upheld the district court's denial of the requested modification, but only because the plaintiff had failed to meet this burden of proof. *Id.* at 1582-83.

The court of appeals' objection in the present case to the district court's modification of Consent Decree I was not that the modification was requested by the plaintiffs, but that it was unjustified and racially discriminatory. It found that "nothing in the record even remotely suggested" that the EEO Monitor's resolution of the claims of the white grievants was discriminatory, but that the district court's "only reason for entering the judgment was to alleviate its concern that, at some unforeseen time in the future, the Department might use the grievance procedure to reinstitute its racially discriminatory practices." Pet. App. 17a n.18. The court of appeals held:

> In sum, if the EEO Monitor's resolution of the three white's [sic] grievances did not discriminate against a member of a plaintiff class, but the court nonetheless felt constrained to nullify the resolutions as violative of Consent Decree I, it follows inexorably that, in the court's view, allowing *any* non-black to invoke the grievance procedure . . . would violate the decree. We therefore treat the declaratory judgment as amending the Revised Complaint Procedure so that it applies only to blacks.

Pet. App. 17a n.18. The court thus concluded that the district court had "no basis in law" for modifying Consent Decree I. Pet. App. 25a. This finding, based on the

unique facts of this case, does not conflict with the law of this Court or any other circuit.

II. The Eleventh Circuit's Order Remanding the Issue of Sanctions Against Plaintiffs' Counsel Is Interlocutory and Should Not Be Reviewed on Writ of Certiorari

The court of appeals' interlocutory order remanding the issue of sanctions against plaintiffs' counsel for further proceedings in the district court is inappropriate for certiorari review. This Court does not ordinarily review interlocutory orders on writ of certiorari. As this Court has held:

> [T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co., 148 U.S. 372, 384 (1893). In *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), the Court similarly held that "except in extraordinary cases, the writ is not issued until final decree." In *Brotherhood of Locomotive Firemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967), the Court denied certiorari, finding that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court."

The court of appeals did not impose sanctions against plaintiffs' counsel. Rather, it remanded the issue to the district court "for the purpose of enabling plaintiffs'

counsel to show cause why section 1927 sanctions should not be awarded to the Adams Intervenors." Pet. App. 27a. No order awarding sanctions has since been entered by either the district court or the court of appeals. Particularly in view of the possibility that this issue may become moot by the denial of sanctions, the petition for writ of certiorari should be denied.

Moreover, no other compelling reason exists for granting the writ on this issue. It is too fact-based to have significant precedential value and does not present a conflict with this Court's decisions or the decisions of other courts of appeals.

III. The Third Issue Stated in the Petition Presents No Issue of Law

Plaintiffs' statement of the third issue on which a writ of certiorari is sought – "Whether an appellate court departs from the accepted course of judicial process by making findings of fact based on its own erroneous construction of evidence in the record" Pet. i – presents only issues of fact and not of law. The Eleventh Circuit has not held that it is free to disregard the district court's findings or to make findings "based on its own erroneous construction of evidence." Rather, it held that the district court's findings were not material in light of the unambiguous provisions at issue:

> Because Consent Decree I and the Revised Complaint Procedure are unambiguous, the district court erred when, in determining whether the amendment violated the decree, it considered

> evidence that the plaintiff classes had introduced at the trial of the case, which was aborted before plaintiffs rested, and testimony given at the March 24, 1997, hearing on plaintiffs' counsel's application for a preliminary injunction. . . .

Pet. App. 24a n.23.

Because this "issue" is fact-based and does not present any conflict among the circuits or legal issue of precedential importance, it does not warrant review on writ of certiorari.

IV. The Eleventh Circuit Did Not Vacate District Court Orders that Were Not Before It

The fourth issue relates to the court of appeals' instruction to "restore the case to the *status quo ante*" and its remark that "nothing has happened in this case since August 9, 1995, when the district court entered its Order and Injunction, amending Consent Decree I to incorporate the Revised Complaint Procedure." Pet. App. 28a. It is a truism that courts of appeals have no jurisdiction to vacate orders that are not properly before them. The court did not, however, vacate any orders other than the ones at issue.

Elsewhere in the opinion, the court specifically vacates orders granting the preliminary injunction and declaratory judgment and instructs the district court to strike the plaintiffs' requests for such relief. Pet. App. 18a, 22a, 26a, 28a. Nothing is said about any other orders or proceedings. Under these circumstances, particularly in light of the court of appeals' limited jurisdiction, the instruction to "restore the case to the *status quo ante*"

simply cannot be read to vacate unspecified orders of which the court may not even have been aware.

In *Reynolds I*, decided less than two months before the opinion at issue here, the court of appeals expressed its frustration at the slow progress of this case:

> With the exception of the prospective injunctive relief Consent Decree I has provided, the paths the parties have followed in litigating this case have led to nothing but the expenditure of time and considerable resources.

202 F.3d at 1319. The Department submits that the court's comment in the opinion below that "nothing has happened in this case since August 9, 1995" is merely an echo of this expression of frustration.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,

Petitioners,

-and-

CECIL PARKER, *et al.*,

Petitioners,

v.

G. M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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I. The Eleventh Circuit Squarely Held that Contempt Is The Only Means Of Enforcing Or Clarifying Consent Decrees And Reversed The District Court's Declaratory Judgment On That Basis

The State does not argue that contempt should be the only means of enforcing or clarifying consent decrees. Nor does it dispute that an inter-Circuit conflict exists if the Eleventh Circuit has adopted a "contempt-only" rule for enforcement or clarification of consent decrees. It argues instead that a "contempt-only" rule has not been adopted and that the Eleventh Circuit permits the full range of equitable remedies allowed by other Circuits. The decision below shows that not to be the case. In the court's own words, "consent decrees are to be enforced . . . through the trial court's civil contempt power." Pet. App. A, pp. 18a-19a. The unequivocal nature of this rule was recently confirmed by the Eleventh Circuit when it "reiterated" the rule in the current case by stating that "*Reynolds v. Roberts* [sets forth] the proper procedure for seeking the enforcement of a consent decree" by requiring that "consent decrees are enforced through the trial court's civil contempt power" and that this is a rule "which a party to a consent decree ***must follow*** in order to seek enforcement of the provisions of the decree" regardless of whether the case has been "administratively closed" for many years. *Florida Assoc. for Retarded Citizen, Inc. v. Bush*, 246 F.3d 1296, 1298 (CA11 2001) (emphasis added).

The Eleventh Circuit's application of the "comtempt-only" rule is unequivocal and absolute. So much so, that attorneys are subject to sanctions if they even ask for any less intrusive remedy, such as a declaratory judgment or other clarification. Counsel in the current case were sharply admonished because they "did not invoke this time-honored procedure [of seeking contempt] to obtain enforcement of . . . Consent Decree I." Pet. App. A, pp. 18a-19a. In the view of the Eleventh Circuit, sanctions should be imposed against such counsel because "[i]nstead of seeking enforcement of the consent decree . . . through the district court's

contempt power, plaintiffs' counsel took another approach in two steps" — first seeking injunctive relief to preserve the *status quo* until the merits of the Decree-interpretation could be reached, followed by entry of a declaratory judgment as an alternative remedy to contempt. Pet. App. A., p. 20a; Pet. App. B, pp. 92a-98a.

A. The Declaratory Judgment Was Not Reversed On Injury Grounds

Respondents argue that the Eleventh Circuit reversed the district court not on the basis of such a "contempt-only" rule, but because no members of the plaintiff class were injured in the way found by the district court. That argument confuses the two appeals consolidated below. The ruling in the first appeal — No. 97-6347 — involved the preliminary injunction entered April 10, 1997. The Eleventh Circuit reversed, in part, because it disagreed with the district court's finding that class members were injured (albeit without applying the clearly erroneous standard review). Pet. App. A, pp. 21a-22a. The ruling in the second appeal — No. 98-6192 — involved the declaratory judgment entered March 3, 1998. The appeals court reversed the declaratory judgment not on the basis of any "lack of injury" rationale, but because of the "contempt-only" rule. Pet. App. A, pp. 23-24a.[1]

In the latter declaratory judgment appeal, the Eleventh Circuit held that although the district court "recognized that an application for injunctive relief is an inappropriate device for enforcing a consent decree, . . . it *sua sponte* transformed the application for injunctive relief into an application for a declaratory judgment" and "failed to realize . . . that it was

1. The two appeals were discussed in separate sections of the Opinion below, with Appeal No. 97-6347 being addressed § II A and the appeal in No. 98-6192 being addressed in § II B. Both appeals were subject to the "contempt-only" ruling, but only Appeal No. 97-6347 involved the additional ground that plaintiff class members were not injured by the challenged grievances despite the trial court's finding to the contrary. *Compare* Pet. App. A, pp. 20a-22a *with* Pet. App. A, pp. 22a-26a.

entering a judgment that could not withstand appellate review" under the Circuit's "contempt-only" rule. Pet. App. A, pp. 24a, 27a. The Court stressed the difference between the two appeals again in the sanctions section of the opinion, holding that "[i]n No. 98-6192" the district court "should have dismissed counsel's application for a permanent injunction under the authority of *Newman v. Alabama*, 683 F.2d at 1318." Pet. App. A, p. 27a. The decision in *Newman*, of course, is the source of the Eleventh Circuit's unique "contempt-only" rule.

B. The Eleventh Circuit Recognizes No Exceptions To The "Contempt-Only" Rule

Again seeking to ameliorate the impact of the Eleventh Circuit's ruling, Respondents argue that other forms of relief to enforce consent decrees are still available in the Eleventh Circuit whenever contempt is not an "adequate remedy at law." The Eleventh Circuit necessarily rejected this limiting argument in the case below when it extended the "contempt-only" rule to declaratory judgments. By statute, declaratory judgments are not subject to the "no adequate remedy at law" requirement. The provisions of 28 U.S.C. § 2201(a) state that a district court "may declare the rights and other legal relations of any interested party . . . *whether or not further relief is or could be sought*." *Id.* (emphasis added). Federal Rule of Civil Procedure 57 states that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief where it is appropriate." Fed. R. Civ. P. 57. The Advisory Committee Note to that Rule further states that declaratory relief "may be joined [to] a demand for coercive relief, cumulatively, or in the alternative, but when coercive relief only is sought but is deemed ungrantable, or inappropriate, the court may *sua sponte*, if it serves a useful purpose, grant instead a declaration of rights." Fed. R. Civ. P. 57 Advisory Committee Note of 1937 (citation omitted); *see also Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("declaratory relief may be considered independently of whether other forms of relief are appropriate"). As explained in *Wright, Miller and Kane*, declaratory judgments provide:

> a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy and in cases in which a party who could sue for coercive relief has not yet done so. The declaratory-judgment remedy enlarges the judicial process and makes it more pliant and malleable by putting a new implement at the disposal of the courts. * * * It permits actual controversies to be settled before they ripen into violations of law or a breach of contractual duty.

Wright, Miller & Kane, Federal Practices & Procedure, § 2751. The Eleventh Circuit's prohibition on alternative remedies even where they are *not* subject to the "adequate remedy at law" rationale of *Newman*, 683 F.2d at 1318, reveals the absolute nature of the Circuit's "contempt-only" rule.

Even if the "adequate remedy at law" rationale of *Newman* left open some possibility that other remedies might still be available whenever contempt is shown to be inadequate, that would still leave a significant inter-Circuit conflict because the other courts of appeals have adopted a different rule that allows less intrusive remedies to be imposed regardless of whether contempt would also be an adequate remedy. The other Circuits allow attorneys and the district courts to consider the comparative advantages of alternative remedies, including whether contempt would be overkill. That was the finding of the district court here. Pet. App. B, pp. 91a-98a.

Since the present Petition was filed, the Third Circuit has rejected a "contempt-only" rule, citing "case law that directly and clearly contradicts [the] claim that a court can exercise its compliance enforcement power only via its contempt power." *Holland v. New Jersey Dep't of Corrections*, 246 F.3d 267, 282 & n.14 (CA3 2001) (citing Second and Fourth's Circuits' decisions in *Brewster v. Dukakis*, 675 F.2d at 2-3 and *Alexander v. Hill*, 707 F.2d at 783); *see also Gates v. Collier*, 616 F.2d 1268, 1271 (CA5 1980). Likewise, the Fourth Circuit has

expressly rejected the contention that a lack of finding of contempt should "preclude exercise of inherent equitable powers to achieve fair remedial results," finding that a district court "is invested with broad equitable powers and simply should not be compelled to operate in a *punishment or nothing* atmosphere," but rather, should be able to concentrate its attention on "[a]lleviation rather than sanction." *Alexander v. Hill*, 707 F.2d 780, 783 (CA4 1983) (emphasis added).[2]

The Eleventh Circuit's analysis is also fundamentally in conflict with that of other Circuits, such as the Fifth and Seventh Circuits, which have recognized that contempt is not an available remedy "at law," but is merely an alternative *equitable* remedy, which does not operate to preclude all other equitable remedies in the manner held in *Newman*, 683 F.2d at 1319. *Matter of Grand Jury Proceedings Empanelled May 1988*, 894 F.2d 881, 884 (CA7 1990) ("civil contempt . . . originated . . . in equity, as a device for enforcing compliance with equitable decrees") (citing *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 457 (1932)); *Wirtz v. Ocala Gas Co.*, 336 F.2d 236, 243 (CA5 1964) (civil contempt characterized as an equitable remedy).

The absolute nature of the Eleventh Circuit's "contempt-only" rule is revealed not only in its rejection of the district court's finding that a lesser remedy than contempt was warranted in the particular circumstances of this case, but also in its treatment of counsel. The Eleventh Circuit's ferocious rebuke of plaintiffs' counsel for seeking less intrusive remedies would have no basis at all if the Eleventh Circuit panel had believed the district court was permitted to consider other remedies.

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2. The All Writs Act empowers district courts in every other Circuit to issue whatever writs they find "necessary or appropriate." 28 U.S.C. § 1651(a)

C. The Eleventh Circuit's Comments About "Rewriting" Or Modifying The Decree Are The Product Of Its "Contempt-Only" Rule

The State argues that the Eleventh Circuit's comments about the district court "rewriting" the consent decree indicates that courts may still *interpret* their decrees by means other than contempt. That is not an inference that can be drawn from the decision below and even if it could, that does not eliminate the Circuit split. First, allowing a court to *modify* a decree does not mean that they may also interpret or enforce it *as written* by any means other than contempt. Plaintiffs sought to enforce the Decree as written, not modify it. The Eleventh Circuit permits interpretation and enforcement only via contempt. "Modification" is an entirely different thing governed by this Court's decision in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). *See Holland*, 246 F.3d at 282 & n.13 (holding that courts must distinguish modification powers from enforcement powers because "there are distinct bodies of jurisprudence and different standards associated" with each).

Second, the Eleventh Circuit's comments about "rewriting" or modifying a consent decree do not imply a willingness to allow such decrees to be interpreted or enforced by means other than contempt. The Eleventh Circuit inferred just the opposite — that any interpretation of a decree through means other than contempt necessarily constitutes a "rewriting" of the decree or else contempt would have been sought. Pet. App. A, p. 19a-20a. In the Eleventh Circuit's view, "[t]he reason why plaintiffs' counsel did not move the court for an order to show cause is obvious: the Department had not disobeyed any of the mandates of the consent decree" (*id.*) because the decree itself permits grievances to be filed and "[t]o say that the Revised Complaint Procedures somehow 'violates' Consent Decree I, as plaintiffs' counsel contended . . . is more than sophistic; it is preposterous." Pet. App. A, pp. 23a-24a. The problem, however, was not that the grievance procedure itself violated the Consent Decree on its face, but that *the use* of the procedure did so

whenever provisional appointments were awarded *before* a vacancy was opened for applications and an equal opportunity to compete.

The district court's reasons for not granting contempt, however, did not involve rewriting the Decree. Pet. App. B, pp. 92a-96a. The district court's decision set forth precisely how the challenged grievances awarding provisional appointments violated the consent decree's existing command that vacancies be filled through open competitive means. Pet. App. B, pp. 85a-86a, 91a. The Consent Decree itself is unambiguous in requiring that "[p]rovisional appointments will be made *only* in accordance with Section 670-X-9-3(3)(d) of the Rules of the Personnel Department, and in no circumstances will be used to avoid black eligibles or the other provisions of this Decree." Pet. App. D, pp. 133a-134a. The provisional appointments that were being given away through grievances violated both of these unambiguous commands of the Decree — they were not made "only in accordance" with the Personnel Department rule, which required open competition, and they "avoid[ed] black eligibles" by considering no one for the vacancy except the grievant.[3] Pet. App. B, pp. 85a-87a, 90a-91a. Moreover, the Decree explicitly provides that the district court "retains jurisdiction to decide any and all questions or disputes which arise under this Decree," Pet. App. D., p. 160a, and "[t]o the extent that this Decree fails to achieve the intent and purpose for which it has been entered, the parties may seek further relief from the Court." Pet. App. D., p. 158a. The district court's findings about the Decree's meaning are the correct ones, not the substituted findings of the Eleventh Circuit which considers enforcement of a consent decree by any means other than contempt to necessarily be a "rewriting" of the Decree.

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3. A "provisional appointment" under the Decree lasts until "the creation of new registers using newly validated minimum qualifications and examinations." Pet. App. D, pp. 123a-124a. That has not yet occurred in this case.

II. Notice And Hearing Should Precede Findings Of Guilt In A Published Opinion That Injures Counsels' Reputation

Respondents argue that certiorari is inappropriate whenever the appellate court finds counsel guilty of serious improprieties, but afterward remands for a determination whether to award sanctions for such misconduct, characterizing such a ruling as "interlocutory." The issue raised in the Petition, however, is not interlocutory or capable of being cured through a post-deprivation hearing on remand. The constitutional error has already occurred and no proceedings on remand can correct it. The Petition seeks review of the *very decision to remand*, arguing that such a remand should have come *before* findings of guilt were spread across the pages of the Federal Reporter, not after.

The notice and hearing required by due process must come *before* such publication and without findings of guilt that are binding on the district court on remand. The district court on remand has declared itself bound by the Eleventh Circuit's findings of serious misconduct.[4] The Court of Appeals, in denying the petition for rehearing, refused to lift those findings so that a real adversarial determination of guilt or innocence could be made for the first time. Absent this Court granting *certiorari*, plaintiffs' counsel are unlikely to ever be given an opportunity to show that they are innocent of the *sua sponte* findings of guilt entered by the Eleventh Circuit.

III. The Eleventh Circuit Reversed Findings Of Fact Without Regard To The Clearly Erroneous Standard Of Review

Although the Respondents argue that the Eleventh Circuit reversed the district court on the basis of a factual finding that no members of the plaintiff class were injured by the provisional appointments challenged below, they then ignore that factual finding when they come to the third question presented — "whether an appellate court departs from the accepted course of judicial process by making findings of fact

4. *See* Order entered January 3, 2001 (Doc. no. 4680).

based on its own erroneous construction of the evidence in the record." At that point in their opposition to *certiorari*, the Respondents argue that the Eleventh Circuit made no findings of fact of its own. Both positions cannot be true.

The Eleventh Circuit, in fact, substituted its own findings of fact for those of the district court on the issue of class members' injuries from the challenged provisional appointments. The district court made detailed findings that class members were not only injured by the challenged promotions, Pet. App. B, pp. 85a-92a, but that their injuries were sufficiently serious to cause "irreparable harm." *Id.* and Pet. App. G, pp. 207a-212a. These findings were supported by extensive testimony from both the injured class members and defendants' officials, showing that qualified class members were being deprived of an equal opportunity to apply and compete for positions that were being awarded by *pre-competition* grievances.[5] There was no appeal of those findings, and no argument that they were clearly erroneous in the Eleventh Circuit. The Court of Appeals raised the issue of injury *sua sponte*, reversing the trial court's findings that class members *were* injured on the basis of an appellate finding that class members *were not* injured. It did so without ever mentioning the district court's contrary factual findings, the extensive evidence that supported such findings, or the clearly erroneous standard of review.

The same improper use of appellate findings of fact occurred in several other contexts, including the finding that only non-black grievants were precluded from pursuing anti-competitive grievances. Plaintiffs' motions were not directed at precluding such grievances only by white employees, but specifically listed black employees by name in the body of the motion as ones that should be prohibited, such as the Roundtree brothers and Willie Mitchell. Pet. App. I, pp. 217a-218a; Pet. App. J,

5. Pet. App. B, pp. 85a-92a; R142-204-205; R137-682-687; R141-186-190, 196-197; R134-72; R135-301-305; R136-486-492, 563-73, 588-89, 595-96, 617-25,646-48, 635-36; R135-234-38,282-83.

pp. 226a, 229a & n.2 (defendants conceding race of grievants). The district court did not grant that motion, as Respondents claim, but explicitly entered an order *denying it* "[b]ased upon *the agreement of the parties* that defendants will temporarily cease processing grievances of the type that are the subject of the motion." Pet. App. H, pp. 214a-215a (emphasis added). It is undisputed that this included grievances by both black and white employees. Pet. App. I, pp. 217-218a; Pet. App. J, pp. 226a, 229a & n.2. The Eleventh Circuit's findings to the contrary are unsupported by the evidence and beyond its authority as an appellate court.

IV. The Plain Language Of The Appellate Mandate Overturns Orders Not Before The Eleventh Circuit

Respondents contend that no one has yet argued for any orders being vacated on remand except the two that were appealed from, but that does not undo the plain words of the appellate mandate: "The Court is instructed to restore the case to the *status quo ante*, which means nothing has happened in this case since August 9, 1995. . . ." Pet. App. A, p. 28a. It will be too late to do anything about such clear-cut instructions after the petition for *certiorari* is denied.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

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